United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

566

No. 22140

SEA-LAND SERVICE, INC.

Appellant

v.

JOHN T. CONNOR, et al.

Appellees

APPEAL FROM FINAL ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

John Mason
Edward M. Shea
900 - 17th Street, N.W.
Washington, D. C. 20006
Attorneys for Appellant

TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SEA-LAND SERVICE, INC.
P. O. Box 1050
Elizabeth, New Jersey,

Plaintiff,

v.

JOHN T. CONNOR, individually,
and as Secretary of Commerce,
Washington, D. C.

NICHOLAS JOHNSON, individually,
as Maritime Administrator, and
as Chairman, Maritime Subsidy Board,
Maritime Administration,
Washington, D. C.

J. W. GULICK, individually, and as
Member, Maritime Subsidy Board,
Maritime Administration,
Washington, D. C.

CARL C. DAVIS, individually, and as
Member, Maritime Subsidy Board,
Maritime Administration,
Washington, D. C.

JOSEPH R. HOCK, individually, and as
Alternate Member, Maritime Subsidy
Board, Maritime Administration,
Washington, D. C.

and

MARITIME SUBSIDY BOARD
Maritime Administration,
Washington, D. C.,

Defendants.

Civil Action No. 2614-65

CIVIL DOCKET

United States District Court for the District of Columbia

DATE		PROCEEDINGS
1965		Deposit for cost by
Oct.	20	Complaint, appearance filed
Oct.	20	Summons, copies (8) and copies (8) of Complaint issued U.S. Atty. Ser 10-21-65; A.G. Ser 11-9-65; #1 Ser 10-25-65; #2,3,4,5 & 6 Ser 10-22-65.
Dec	22	Answer of defendants to complaint, c/m 12-22-65, Appearance David G. Bress, filed
Dec.	22	~~Enter appearance of Leavenworth Colby for defendants.~~ filed
Dec	22	Calendared (N) AC/N
1966		
Feb	9	Notice of plaintiff to take oral deposition of A.T. DeSmidt; c/m 2-9-66. filed
March	31	Motion American Export Isbrandtsen Lines, Inc. to intervene as defendant; exhibit; consent; appearance Richard W. Kurrus; deposit $5.00 by Kurrus. (2000 K Street, N.W.) filed
March	31	Order granting leave to American Export Isbrandtsen Lines, Inc., to intervene as party defendant. (N) Gasch, J.
April	1	Answer of Intervenor to complaint. filed
June	23	Motion of plaintiff for production of documents; affidavit; points and authorities; c/m 6/23/66; N.C. 6/23/66. filed
June	30	Stipulation of counsel extending time to respond to motion for production of documents to and including July 15, 1966. filed
July	15	Deposition of Joseph T. Graziano and W. Lyle Bull, June 2, 1966.
---		filed
Oct.	27	Called. Assistant Pretrial Examiner
Nov.	27	Motion of pltff. for production of documents; c/s and c/m; attachment; affidavit; P&A; N.C. 11-22- . filed
Dec.	13	Objections by defendant to plaintiff's motion for production of documents; c/m 12/12/66. Attachment (1) filed
Dec.	21	Reply of pltf to objections of deft to plaintiffs motion for production of documents; P&A; affidavit; exhibits (2); c/m 12/21/66. filed
1967		
Jan.	18	Recommendation denying motion for production of documents. See recommendation for details. (AC/N) Assistant Pretrial Examiner
Feb	2	Affidavit of Edward M Shea. filed

DATE		PROCEEDINGS
1967		
Feb	2	Consent/order granting pltff's motion to require deft. American Export Isbrandstsen Lines, Inc., to produce certain documents, and entry of this order shall be construed as meeting conditions for reconsideration set forth in the Pretrial Examiner's Recommendation of Jan. 18, 1967. (Rep: B.A. Williamson) (N) Micro 2/6/67 CURRAN, C.J.
Feb	3	Motion of Pltff. for reconsideration; Affidavit; Exhibits (2); c/m 2/3/67; M.C. 2/3/67. filed
Feb	13	Response of the defs to pltff's motion for reconsideration; c/m 2/10/67. filed
Mar.	10	Recommendation denying in part and allowing in part reconsideration of previous recommendation; production of said documents to be before April 1, 1967. See recommendation for details. (AC/N) Pretrial Examiner
Mar.	16	Motion of defts for extension of time to file objections to recommendation of Pretrial Examiner; c/m 3/13/67; M.C. filed
Mar	30	Motion of plaintiff to stay Rule 13; P&A; Affidavit; c/m 3/30/67; exhibit; MC. filed
Mar.	30	Order granting defendants until April 8, 1967 to file objections to recommendations of Pre-Trial Examiner entered on March 10, 1967. (N) Sirica, J
Apr.	7	Stipulation of counsel excluding certain documents relative to discovery to be made by deft, as recommended by Pretrial Examiner. filed
Apr	27	Order staying operation of Rule 13 until Oct. 1, 1967. (N) Jones, J.
Aug.	18	Request for admissions by pltf; exhibits 35; c/m 8/18/67. filed
Aug	28	Amendment of plaintiff to request for admissions; c/s 8-28-67 filed
Sept.	11	Stipulation extending time to respond to requests for admissions to and including September 22, 1967. (fiat) Curran, C.J.
Sept.	25	Consent Order extending time of defendants and intervenor-defendant to respond to Plaintiff's request for Admissions to and including Oct. 2, 1967. (N). Curran, C. J.
Oct.	3	Response of defendants and intervenor defendant to request for admissions, service acknowledged by Plff. 10/2/67. filed

DATE	PROCEEDINGS
1968	
Jan 17	Motion of pltff for summary judgment; affidavit, statement; P&A's; c/m 1-17-68; M.C. filed
Jan. 23	Consent order extending time to respond to motion for Summary Judgment to and including 2-28-68.
Feb. 21	Motion of defts. and Intervenor-Deft. for extension of time to respo to Pltff's motion for summary judgment; c/s 2/21/68 M.C.
--	filed
Feb. 27	Order extending time for filing opposition to plaintiff's motion fo summary Judgment until March 21, 1968. (N) McGuire,J.
~~Mar 1~~	~~First Notice Under Rule 43~~ (ERROR)
Mar 15	Motion of defts for extension of time to respond to motion for summa judgment; c/m 3-15-68; M.C. filed
Mar. 15	Memorandum of deft. American Export Isbrandtsen Lines Inc. to motion for summary judgment. c/m 3/15/68. filed
Mar. 29	Opposition of defts. to motion of pltff. for summary judgment; P&A; Statement; c/m 3/29/68 filed
Apr. 15	Order denying plaintiff's motion for summary judgment; granting defendants' demand for judgment dismissing action; action dismissed on merits, defendants to recover of plaintiff their costs. (N) Micro. 4/16/68 Holtzoff. J.
June 11	Notice of appeal by plaintiff from order of 4/15/68. copies mailed to L. Colby & R. W. Kurrus. Deposit $5.00 by Shea. filed
June 13	Cost bond on appeal by Plaintiff in sum of $250.00 with Fidelity and Deposit Co. of Maryland approved. Filed
-	Curran, C.J.
June 26	Transcript of proceedings Vol one- Pages 1-56. April 10,11, 1968. Reporter Gerald Nevitt, Courts copy. filed

JUL 6 1968

(S E R V E D)
(September 10, 1965)
(MARITIME ADMINISTRATION)
(MARITIME SUBSIDY BOARD)

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

Docket No. A-19

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
APPLICATIONS FOR CONSTRUCTION-DIFFERENTIAL SUBSIDY
TO AID IN THE CONVERSION OF TWO ORE CARRIERS TO CONTAINERSHIPS
AND FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE 5-7-8-9

In the matter of the petition of Sea-Land Service, Inc., to the Maritime Subsidy Board to reopen for reconsideration its decision of August 12, 1965, in approving the applications of American Export Isbrandtsen Lines, Inc., for construction-differential subsidy, operating-differential subsidy and the use of capital reserve funds in the purchase and conversion of two proposed containerships for operation on Trade Route 5-7-8-9. Petition denied.

Submitted September 1, 1965 Decided September 9, 1965

OPINION OF THE MARITIME SUBSIDY BOARD/MARITIME ADMINISTRATOR

Nicholas Johnson, Chairman; J. W. Gulick and Carl C. Davis, Members, and Joseph R. Hock, Alternate Member*

Served Upon:

John Mason, Esquire of Ragan & Mason, 900 - 17th Street, N.W., Washington, D. C., on behalf of Sea-Land Service, Inc., Petitioner.

Richard W. Kurrus, Esquire and James N. Jacobi, Esquire, 2000 K Street, N.W., Washington, D. C. 20006; and Donald L. Caldera, Esquire, 26 Broadway, New York, N. Y. 10004, on behalf of American Export Isbrandtsen Lines, Inc., Applicant.

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* Mr. Hock announced that while he did not cast a vote in the unanimous opinion of the Maritime Subsidy Board composed of Chairman Johnson, Member Gulick and Member Davis, as set forth in Docket No. A-19, he was concurring therein.

By our decision of August 12, 1965, the Maritime Subsidy Board (Board) took the actions, and made the findings and determinations, in respect to the applications of American Export Isbrandtsen Lines, Inc., (AEIL) for construction and operating-differential subsidy, as set forth in Appendices B, C and D, hereunto attached.

On September 1, 1965, Sea-Land Service, Inc., (Sea-Land) filed a petition with the Maritime Subsidy Board, Maritime Administration, urging the Maritime Administrator and the Maritime Subsidy Board to reopen, reconsider and reverse their actions and findings of August 12, 1965, approving AEIL's applications for construction-differential subsidy to aid in the conversion of two ore carriers to containerships, and for operating-differential subsidy to cover the operation of those ships, after their conversion, on Trade Route 5-7-8-9.

As grounds for reconsideration, Sea-Land, among other things, alleged:

(1) that the Board's finding that the proposed substitution of the SSs TRANSINDIA and TRANSORIENT for the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN requires neither re-publication in the Federal Register nor hearing under Section 605(c) of the 1936 Act (Paragraph II-C-1, Page 3, Appendix B) is erroneous;

(2) that the Board's finding that service on Trade Route No. 5-7-8-9 by ships of United States registry is inadequate, and in the accomplishment of the purposes and policy of the 1936 Act additional sailings with ships of United States registry are required (Paragraph II-C-2, Page 3, Appendix B) is founded upon an inadequate and misleading record and is, therefore, erroneous;

(3) that the Board's findings that the operation of the vessels after conversion to containerships is required to meet foreign-flag competition and that granting of financial aid is necessary to place the proposed operations of the vessels on a parity with those of foreign competitors (Paragraph II-A-1, Page 2, and Paragraph II-A-4, Page 3, Appendix B) are erroneous;

(4) and that there has been no consideration by the Board of the issue of undue advantage to AEIL and undue prejudice to Sea-Land through the award of subsidy to AEIL, and on the basis of such allegation reconsideration is indicated.

On September 3, 1965, AEIL filed with the Board its reply to the petition of Sea-Land "to reopen for reconsideration".

In its reply AEIL, among other things, alleged in effect:

(1) that the petition of Sea-Land was procedurally defective, that the petitioner had never operated on Trade Route 5-7-8-9, and that the petitioner had no standing to contest the Board's findings and determinations of August 12, 1965, in respect to AEIL's applications;

(2) that each of the allegations submitted by Sea-Land, as set forth above, was without foundation, and that all of the findings and determinations made by the Board, as set forth in the Board's actions of August 12, 1965, (Appendices A, B, C and D) were in keeping with all pertinent requirements and provisions of the 1936 Act; and, therefore, the petition of Sea-Land should be promptly denied.

The Board has carefully reviewed and reconsidered its actions and findings of August 12, 1965, in respect to this matter. In addition, the Board has carefully reviewed and considered the petition filed by Sea-Land and the reply filed by AEIL. In so doing, the Board cast aside all allegations as to procedural defects and considered the petition on its merits on the basis that the Board actions of August 12, 1965, in respect to the instant case had not been finalized or approved by the Secretary of Commerce prior to the 20-day review period, provided in Department Order No. 117 (revised), which did not expire until close of business on September 1, 1965, and the petition to reopen for reconsideration had been filed prior to close of business on that date. 1/

1/ Under established procedure a petition for review and reversal of a Board decision should be filed with the Secretary of Commerce within ten days of the Board action. Likewise a petition to the Board for reconsideration of a Board action should be filed within ten days of the Board action. In this instance, however, petition of Sea-Land was filed as authorized by telegram from the Office of General Counsel, Department of Commerce.

The facts are that on April 7, 1965, American Export Isbrandtsen Lines, Inc., filed an application for operating and construction differential subsidy on the conversion of two ore carriers, MC Design C5-S-AX1, to two containerships, MA Design C5-S-77a, for operation on Trade Route 5-7-8-9 as replacements for two cargo vessels (SSs RENSEN HEIGHTS, an AP2 type, and SIR JOHN FRNAKLIN, a C-1 type) currently operating without subsidy on that Trade Route (U. S. North Atlantic/ United Kingdom and Continent).

On May 26, 1965, the Maritime Administration issued a press release entitled, "AEIL Containership Service under Consideration by MA", which was widely covered in the public press. The press release listed six specific advantages to the Government in the AEIL proposal as listed below:

1. The establishment under U.S. flag of the first international containership service at minimal cost.

2. The advantage of low captial investment that would be required to gain experience in a new field with minimum risk.

3. Upgrading of the capacity of the conventional ships which would be replaced by the containerships.

4. Reduction in cost of both operating and construction subsidy to the Government.

5. Increase in subsidy recapture - including the possibility of total recapture - if the operation results in the expected substantial profit.

6. Replacement of the containerships as promptly as desired by the government.

On June 1, 1965, invitations to bid on the award of a conversion contract were issued and responses thereto were publicly opened and read on June 24, 1965. The bids were predicated on an award to the low responsive bidder within 60 days after bid opening. The low responsive bidder on the fixed price bid was Sun Shipbuilding and Dry Dock Company ($3,860,000 for each vessel on Bid A(1), and $3,770,000 for each vessel on Bid A(2)).

After careful consideration of all the facts and circumstances involved, the Maritime Subsidy Board, by unanimous vote, on August 12, 1965, made the necessary findings and determinations in approving the application of AEIL, as set forth in two separate letters to AEIL dated August 13, 1965 (Appendices A & B). In addition, the Board determined that Sun Shipbuilding and Dry Dock Company had submitted the lowest responsive domestic bid (Appendix D), and at the same time, denied that portion of AEIL's application calling for operating-differential subsidy on the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, pending conversion of the two ore carriers to container-ships for subsidized service on Trade Route 5-7-8-9 (Appendix C).

On August 19, 1965, the Board announced the actions set forth above in a press release of that date. Thereafter, on September 1, 1965, Sea-Land filed its petition with the Maritime Subsidy Board.

Under these circumstances, it now becomes necessary for the Board to take appropriate action on the merits of the petition and, having done so, submit the matter again to the Department of Commerce for appropriate review in keeping with the provisions of D. O. 117 (Revised). Having reviewed the petition, we find that it presents nothing of consequence and nothing that would in any manner establish improper or illegal action by the Board under all pertinent provisions of the 1936 Act.

The advantages to the nation and the maritime industry in the inauguration of an early U. S.-flag North Atlantic Container Service seem quite obvious. The advantages to the Government and to the operator in the operation of old ships is a minimizing action of risk with low capital investment plus quick installation of service, as spelled out in the Board actions of August 12, 1965.

An important factor in the Board's conclusion to permit the operator "to start a container service with old ships" relates to the duration of the operating-differential subsidy agreement for coverage of these two vessels under subsidy after conversion and reconstruction. The applicant requested a 10-year guarantee for operating-differential subsidy. The Board, however, viewed the matter as an experimental venture in the initiation of a container service justifying the use of existing ships which are to be reconstructed as a low cost means of entry into a modernized service in the international trade. Accordingly, the Board found that a period of approximately five years should be adequate in which the Government and the operator might evaluate the undertaking and decide whether to build new replacement ships, review the economic feasibility of the operation and take such additional action as might be warranted at that time regarding continuation of the service under operating-differential subsidy. As a result, the Board approved a proposed operating-differential subsidy agreement for these two ships terminating December 31, 1971, and requiring the Board, prior to May 1, 1971, to make a complete evaluation of the undertaking and determine at that time whether or not subsidy should be continued beyond December 31, 1971.

On the basis of the findings and determinations made by the Board as set forth in the two letters of August 13, 1965 (Appendices A & B) and, more particularly, those specifically mentioned above to further the development and maintenance of an adequate and well balanced American Merchant Marine and to promote the commerce of the United States, the Board feels confident that the question relating to the commencement of a container service is fairly resolved by conclusions that are thoroughly justified.

Turning now to the question of whether the granting of this permission vitiated the rights of others and the requirements of Section 605(c) of the 1936 Act, the Board concluded that Section 605(c) does not impose a bar to the award of subsidy to American Export Isbrandtsen Lines, Inc., on two containerships of the C5-S-77a type to be operated on a schedule of from 18 to 26 sailings per year on Trade Route 5-7-8-9 (U. S. North Atlantic/ United Kingdom and Continent).

By application dated February 24, 1964, AEIL requested operating-differential subsidy for its presently non-subsidized service on Trade Route No. 5-7-8-9 currently maintained with the SSs RENSEN HEIGHTS and SIR JOHN FRANKLIN which, by letter of authorization dated March 6, 1962, were limited to 18 sailings per year. AEIL's application of February 24, 1964, requested a minimum of 15 and a maximum of 26 sailings per year on a subsidized basis.

Notice of application was published in the Federal Register on April 1 -- 29 Fed. Reg. 4686 (1964) -- which notice concluded with the statement, "If no request for hearing and petition for leave to intervene is received within the specified time, or if the Maritime Subsidy Board determines that petitions for leave to intervene filed within the specified time do not demonstrate sufficient interest to warrant a hearing, the Maritime Subsidy Board will take such action as may be deemed appropriate."

In due course, Waterman Steamship Corporation filed a petition to intervene and the application was referred to the Chief Hearing Examiner, identified for hearing as Docket No. S-166, and set down for pre-hearing conference on May 21, 1964, in keeping with established procedure.

Prior thereto, however, on May 18, 1964, Waterman Steamship Corporation, the only intervenor, withdrew its opposition by telegram, and as a result neither Waterman nor any other person, other than Public Counsel, appeared at the pre-hearing conference. Accordingly, on May 25, 1964, the Chief Hearing Examiner returned AEIL's application for ODS on Trade Route 5-7-8-9 (Docket No. S-155) to the Board with the statement, "In view of the lack of any opposition to the application, it is hereby referred back to the Board for administrative processing." Thereafter, the application was analysed by the staff and a memorandum from the Chief, Office of Government Aid, dated July 9, 1964, was submitted to the Board with recommendation for a finding of inadequacy in connection with AEIL's application of February 24, 1964.

Although the Board was in agreement with the finding of inadequacy, it deferred further action on the matter pending the development of a more modernized service that would furnish the American Merchant Marine with something superior to the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN.

The Board's determination of inadequacy on this service without further hearings was in keeping with its position in considering the Waterman Steamship Corporation application for operating-differential subsidy. In respect to Waterman's application, the Board found on July 31, 1964, that it would require no further hearings under Section 605(c) in connection with Waterman's subsidy applications on Trade Routes 5-7-8-9, 12, 21, 22 and 29. 2/ The fact

2/ Page 1363, Vol. 6, Minutes of the Maritime Subsidy Board.

that no operating subsidy agreement has yet been awarded to Waterman relates to the application of other pertinent Sections of the 1936 Act and other collateral matters, none of which had any relation to Section 605(c). The Board's findings at that time were obviously in accordance with Sea-Land's views, since at that time, Waterman was, with Sea-Land, wholly-owned by McLean Industries, Inc.

The allegation that American flag containers cannot be subsidized to meet foreign-flag competition in the absence of foreign flag containers on a given Trade Route is ridiculous on its face. Competition is met by providing effective, efficient and essential service. The classification of a vessel as a container-ship as opposed to a cargo ship has no bearing on the subject.

Sea-Land has given no indication as to its estimates of "available" traffic which may be containerized so that it is impossible to comment further on this point. It is generally recognized, however, that the carrying of containerized cargo both by U. S. and foreign-flag ships is expanding, and it seems important that the Board accept the opportunity presented by AEIL to provide for the development of a containership service on an experimental basis at a relatively low cost to both the operator and the Government. There have been situations in the past where subsidy has been denied to certain operators because other U. S.-flag operators have indicated intentions of entering and have actually entered service on a nonsubsidized basis, only to have such interveners subsequently apply for subsidy themselves, once the original applicant was out of the way.

The affidavit and Annual Report, 1962, of McLean Industries, Inc., and Report for Twenty-Eight Weeks ended July 28, 1965, attached to Sea-Land's

petition, show that Sea-land had announced plans for its containership service, and had engaged in a preliminary move pursuant to those plans, including the acquisition and conversion of ships, well prior to the filing of the application of Container Marine Lines, Inc.

Although the documents referred to would not in any sense be considered to constitute service on Trade Route 5-2-8-9, only one of the reports mentioned (The McLean Industries 1964 Annual Report to Stockholders, dated March 19, 1965) makes even a casual reference to consumation of plans for expanding during the next three years, including the opening of new routes in the Caribbean and to Europe. In fact, the McLean Report for 28 weeks ended July 17, 1965, not only fails to mention any plans for extension of services to Europe, but states, "With routes and terminals now firmly established, it is economically advantageous to remove many of the shipboard cranes and replace them with the faster dockside equipment."

While the affidavit filed by the Company's President goes into more detail and states that Sea-land will inaugurate service March 1, 1966 with two ships with a capacity of 476 trailers each and expects to increase this to 576 trailers each towards the end of June 1966, leading to weekly sailings by the end of 1966 by the introduction of two additional ships, bringing the annual cargo capacity to over 500,000 tons, this affidavit, which was executed on August 31, 1965, cannot, of course, be considered prior notice to the Board, or even a promise that adequate service will be inaugurated and maintained.

A review of the traffic statistics for the years 1963 and 1964 showed that the outbound movement of traffic on Trade Route 5-7-8-9 comprised 2,350,600 tons in 1963 and 2,757,600 tons in 1964. U.S.-flag participation in these movements, including carryings of AEIL's REMSEN HEIGHTS and SIR JOHN FRANKLIN, was approximately 23% in 1963 and 24% in 1964. In the analysis below the figures not only show the continued inadequacy of service on Trade Route 5-7-8-9 for the years 1963 and 1964 but that even if the proposed containerships of AEIL and Sea-Land were operating in the service during those years at 100% of capacity, U.S.-flag service would still be considered to be inadequate.

Trade Route 5-7-8-9	1963	1964
1.) Total outbound lines commercial cargoes (tons)	2.35 Million	2.76 Million
2.) % U. S. Flag participation	23.5 %	24.2 %
3.) % Utilization - U. S. flag ships*	80.0 %	80.5 %
4.) U. S. flag participation (tons)	552.0 Thousand	667.5 Thousand
5.) Less: Carryings of SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN**	48.3 Thousand	54.3 Thousand
6.) U. S. flag participation without SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN	503.7 Thousand	613.2 Thousand
7.) Add: 100% Capacity of AEIL containerships	208.0 Thousand	208.0 Thousand
8.) 100% Capacity of proposed Sea-Land Containerships	558.6 Thousand	558.6 Thousand
9.) Total U. S. flag participation (Capability)	1.27 Million	1.38 Million
10.) % U. S. flag participation (Capability)	54.0 %	50.0 %

* Outbound. Subsidized ships only.

** To be removed from service upon introduction of AEIL Containerships.

In this connection, attention is called to the following comments made by the Secretary of Commerce in his Remand Order of May 23, 1963 in the Atlantic Express Lines' case in Docket S-124:

> "...I believe the Congressional declaration of policy should be interpreted to mean we should consider a 50% objective as a goal in determining whether we have a merchant marine sufficient to carry 'a substantial portion of the water-borne export and import foreign commerce of the United States', and in applying this guideline to any given factual situation no particular arithmetical percentage will be deemed per se adequate or per se inadequate; rather, it will be recognized that a U.S. merchant marine service of the highest percentage practically attainable is our goal.
>
> "The foregoing statement is hereby adopted as a guideline to be followed in making determinations on the issue of inadequacy in future section 605(c) proceedings."

After further analysis of the situation, the Board concluded that there was no legal requirement for re-publication of AEIL's new application of April 7, 1965, and further concluded that the type of ship to be employed is not an issue under Section 605(c), the issue being inadequacy of present U.S.-flag service and whether or not the addition of American flag vessels would lessen the inadequacy and be in furtherance of the purposes and policy of the Act. The Board's findings and determinations in this regard, as previously stated, are set forth in detail in the letters of August 13, 1965, to AEIL (Appendices A and B), not only in respect to Section 605(c), but all other pertinent provisions of the 1936 Act herein involved.

In respect to 605(c), as well as all other aspects of this case, the matter may be simply stated by reciting the fact that having noted AEIL's application for public hearing on the operation of two cargo vessels (the REMSEN HEIGHTS and SIR JOHN FRANKLIN), having determined that no hearing was necessary in the absence of interventions, having established inadequacy of service on this route, having established that the substitution of two reconstructed modernized

containers offers better service to lessen the inadequacy than the operation of two old cargo vessels, having determined that the inadequacy established in 1964 continues to exist in 1965, and having carefully applied all pertinent provisions of the 1936 Act in regard to AEIL's application of April 7, 1965, the Board found and determined that the operation of two containerships with subsidy on this service was not barred by Section 605(c) and would not vitiate the rights of others whose combined efforts to date have failed to obviate the inadequacy which continues to exist. In addition, the Board and the Administration made all other findings and determinations required by the 1936 Act in approving AEIL's application.

After consideration of the Sea-Land petition, the reply of AEIL and the entire record, as it now stands in respect to this matter, the Board, by unanimous vote, denies the petition of Sea-Land and reaffirms all of its findings and determinations, as set forth in Appendices A, B, C and D. In addition, it is hereby stated that Chairman Johnson of the Maritime Subsidy Board, acting in his capacity as Maritime Administrator, hereby denies the petition of Sea-Land and reaffirms all of his actions in his capacity as Maritime Administrator, as set forth in Appendices A and B.

James S. Dawson, Jr.
Secretary

SO ORDERED
BY THE MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATOR
September 9, 1965

(S E R V E D
(September 30, 1965
(MARITIME ADMINISTRATION
(MARITIME SUBSIDY BOARD

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
MARITIME SUBSIDY BOARD

Docket No. A-19 (Sub-1)

AMERICAN EXPORT ISBRANDTSEN LINES, INC.
APPLICATIONS FOR CONSTRUCTION-DIFFERENTIAL SUBSIDY
TO AID IN THE CONVERSION OF TWO ORE CARRIERS TO CONTAINERSHIPS
AND FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE 5-7-8-9

In the matter of the petition of Sea-Land Service, Inc., to the Maritime Subsidy Board to reopen for reconsideration its decision of August 12, 1965, in approving the applications of American Export Isbrandtsen Lines, Inc., for construction-differential subsidy, operating-differential subsidy and the use of capital reserve funds in the purchase and conversion of two proposed containerships for operation on Trade Route 5-7-8-9. Petition denied.

SUPPLEMENTAL OPINION OF THE MARITIME SUBSIDY BOARD/MARITIME ADMINISTRATOR

Nicholas Johnson, Chairman; J. W. Gulick and Carl C. Davis, Members, and Joseph R. Hock, Alternate Member*

Served Upon:

John Mason, Esquire of Ragan & Mason, 900 - 17th Street, N.W., Washington, D. C., on behalf of Sea-Land Service, Inc., Petitioner.

Richard W. Kurrus, Esquire and James N. Jacobi, Esquire, 2000 K Street, N.W., Washington, D. C. 20006; and Donald L. Caldera, Esquire, 26 Broadway, New York, N. Y. 10004, on behalf of American Export Isbrandtsen Lines, Inc., Applicant.

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* Mr. Hock announced that while he did not cast a vote in the unanimous opinion of the Maritime Subsidy Board composed of Chairman Johnson, Member Gulick and Member Davis, as set forth in Docket No. A-19, (Sub-1), he was concurring therein.

In an Opinion published and served on September 10, 1965 (Docket No. A-19) in respect to the foregoing matter there was included, on Page 3 thereof, a footnote (No. 1) reading as follows:

> "Under established procedure a petition for review and reversal of a Board decision should be filed with the Secretary of Commerce within ten days of the Board action. Likewise a petition to the Board for reconsideration of a Board action should be filed within ten days of the Board action. In this instance, however, petition of Sea-Land was filed as authorized by telegram from the Office of General Counsel, Department of Commerce."

The footnote, as quoted above, was misleading and, in fact, in error in that it referred to "petitions for reconsideration" as distinguished from "petitions to reopen for reconsideration" as provided in the Rules of Practice and Procedure. The "telegram from the Office of General Counsel" as referred to in the footnote did not "authorize" the filing by Sea-Land; it merely confirmed oral notification from Sea-Land's attorney that he intended to file with the Board a petition pursuant to the Rules of Practice and Procedure.

The record shows that on September 1, 1965, Sea-Land Service filed a document identified as, "Petition of Sea-Land Service, Inc., to Reopen for Reconsideration" pursuant to Section 201.174, Rules of Practice and Procedure, Maritime Subsidy Board, Maritime Administration, U.S. Department of Commerce, effective October 23, 1964 (October 22 - 29 Fed. Reg. 14475 (1964)).

In this regard it should be noted that Section 201.174 - Petition for Reopening, is modified by Section 201.172 - Time for Filing Petition to Reopen - which provides that "except for good cause shown, and upon leave granted, petition to reopen under Section 201.174 shall be filed with the Administration within twenty (20) days after the date of service of the Administration's decision or order in the proceeding, unless a different period is fixed under Section 201.54." The petition of Sea-Land was filed pursuant to this rule and therefore conformed to existing procedural requirements.

As indicated in the Board/Administrator's Decision (Docket No. A-19),

"the Board cast aside all allegations as to procedural defects and considered the petition on its merits on the basis that the Board actions of August 12, 1965, in respect to the instant case had not been finalized or approved by the Secretary of Commerce prior to the 20-day review period, provided in Department Order No. 117 (revised), which did not expire until close of business on September 1, 1965, and the petition to reopen for reconsideration had been filed prior to close of business on that date."

On the basis of the foregoing and in consideration of the entire record, as it now stands in respect to this matter, the Board, by unanimous vote, reasserts and reaffirms the fact that the petition of Sea-Land to reopen and reconsider has been considered on its merits and denied by Board action of September 9, 1965, as set forth in the Opinion published and served on September 10, 1965 (Docket No. A-19), and furthermore, in this supplemental opinion (Docket No. A-19 (Sub-1)), hereby deletes and expunges from the record Footnote No. 1, Page 3, Board/Administrator Opinion (Docket No. A-19).

James S. Dawson, Jr.
Secretary

SO ORDERED
BY THE MARITIME SUBSIDY BOARD/
MARITIME ADMINISTRATOR
September 30, 1965

U.S. DEPARTMENT OF COMMERCE

Office of the Secretary

ORDER

In the Matter of: American Export Isbrandtsen Lines, Inc., Application for Operating and Construction-Differential Subsidy in Connection with the Proposed Conversion of Two Ore Carriers to Containerships, Maritime Subsidy Board Docket No. A-19

The Petition of American Export Isbrandtsen Lines, Inc., filed September 14, 1965, and the Petition of Sea-Land Service, Inc., filed September 20, 1965, for Secretarial review of the above action of the Maritime Subsidy Board are hereby denied.

SO ORDERED

John T. Connor
Secretary of Commerce

Date: OCT 4 1965

United States District Court for the District of Columbia

Sea-Land Service, Inc. *Plaintiff.* *vs.* John T. Connor, et al. *Defendant.*	CIVIL No. 2614-65

COMPLAINT
(Injunction)

Plaintiff, Sea-Land Service, Inc. (Sea-Land), for its complaint against defendants states:

1. Jurisdiction.

Plaintiff invokes the jurisdiction of this court under 28 U.S.C. §§1331 and 1337, D. C. Code §11-306, and 5 U.S.C. §1009(c). This action arises under the laws of the United States, including Section 605(c) of the Merchant Marine Act, 1936 (49 Stat. 2003, as amended, 46 U.S.C. §1175), Section 5(a) of the Administrative Procedure Act (60 Stat. 239, 5 U.S.C. §1004(a)), and Section 10(a) of the Administrative Procedure Act (60 Stat, 243, 5 U.S.C. §1009(a)). The matter in controversy, exclusive of interest and costs, exceeds $10,000.

2. Parties.

A. Plaintiff is a corporation organized under the laws of Delaware, having its principal place of business at Elizabeth, New Jersey. Plaintiff's address within the District of Columbia is Room 703, McLachlen Bank Building.

B. Defendant John T. Connor is Secretary of Commerce

of the United States, and, as such, under Reorganization Plan No. 7 of 1961 has primary responsibility with respect to the making, amending, and otherwise effectuating construction differential and operating differential subsidies pursuant to the provisions of the Merchant Marine Act, 1936, as amended. Defendant Maritime Subsidy Board and Defendant Maritime Administrator are delegatees of the Secretary of Commerce, pursuant to Department Order No. 117 of 1962, for the purpose of exercising said functions with respect to conducting hearings and making determinations prior to the making, amending, or otherwise effectuating subsidy contracts. Defendant Nicholas Johnson is the Maritime Administrator and Chairman, Maritime Subsidy Board. Defendants J. W. Gulick, Carl C. Davis, and Joseph R. Hock are the members of the Maritime Subsidy Board. The addresses and official residences of each of said defendants is Washington 25, D. C.

3. Plaintiff's Standing and Interest.

Plaintiff is an operator of trailerships (containerships) in the domestic and foreign commerce of the United States. Plaintiff, on or about March 1, 1966, will inaugurate service, without subsidy in any form, [1/] between United States North Atlantic ports and ports in Western Europe using trailerships. Planning and substantial commitments regarding this

---

1/ Titles V and VI of the Merchant Marine Act, 1936, provide for the subsidization of construction and operation of U. S. flag vessels in foreign commerce under certain circumstances.

service were announced and undertaken prior to the complained of acts by defendants hereinafter described.

The common carrier by water service provided by a trailership differs from that provided by the traditional break-bulk ship in that an integrated service is provided, the trailer being placed at the shippers' plant where the cargo is loaded into the trailer by the shipper, the said trailer then being transported intact to the ultimate destination overseas, where it is unloaded by the consignee. Substantial cost advantages are realized, in comparison with traditional break-bulk ships, in that it is the trailer itself which is loaded onto the trailership for the ocean passage. In the operation of traditional break-bulk ships, traffic must be unloaded from the trailer or rail car at the port of export, loaded into and unloaded from the break-bulk vessel in sling-load lots and at port of discharge reloaded into land conveyances for delivery to the ultimate consignee.

4. The Subsidy Proceeding.

On February 24, 1964, American Export Isbrandtsen Lines, Inc. (AEIL), through its subsidiary, American Export Lines, made application for an operating differential subsidy on Essential Trade Routes 5-7-8-9 (which include United States North Atlantic ports and ports in Western Europe) with defendant Maritime Subsidy Board. That application was duly noticed in the Federal Register of April 1, 1964, for public

hearing pursuant to Section 605(c) of the Merchant Marine Act, 1936. That notice specifically described a subsidized freight service utilizing two ships presently operating on that route on a non-subsidized basis. The two ships contemplated to be used in that application were war-built break-bulk cargo vessels.

There being no opposition, defendant Maritime Subsidy Board made the requisite finding pursuant to Section 605(c) without hearing. After action was first deferred on this application, AEIL by letter of August 12, 1965, was advised that its application of February 24, 1964, had been denied by defendant Maritime Subsidy Board.

On April 7, 1965, while the application of February 24, 1964 , was still before defendants Maritime Administrator/ Maritime Subsidy Board, AEIL filed a second application, on behalf of Container Marine Line, Inc., a subsidiary to be formed. This second application was for construction differential subsidy in the conversion of two ore carriers to containerships and for operating differential subsidy in the operation of the converted containerships on the forementioned trade routes. Although on May 26, 1965, defendants Maritime Administrator/Maritime Subsidy Board issued a press release announcing that this second application had been filed, the application was not at that time made public. At no time did defendants Maritime Administrator/Maritime Subsidy Board publish notice of or hold a hearing pursuant to Section 605(c) in respect to this

second application; instead defendants Maritime Administrator/ Maritime Subsidy Board concluded ex parte that the Section 605(c) findings relating to the first application for the subsidy of the operating break-bulk ships met the requirements of the statute in respect to the second application, relating to the large containerships.

By press release dated August 19, 1965, defendant Johnson, in his capacities as Chairman of the Maritime Subsidy Board and as Maritime Administrator, announced approval by those agencies of the second application above described. This announcement was the first knowledge on the part of plaintiff that this proposal had been under consideration by those agencies. On September 1, 1965, plaintiff petitioned those agencies to reopen and reconsider their approval of the different proposal. On September 10, 1965, those agencies served their opinion and order denying plaintiff's petition to reopen and reconsider.

Thereafter, plaintiff filed on September 20, 1965, a petition to defendant Secretary of Commerce requesting that he review the decisions of defendants Maritime Subsidy Board/ Maritime Administrator pursuant to the provisions of Section 7 of Department Order 117. On October 4, 1965, defendant Secretary of Commerce entered an order denying plaintiff's said petition for Secretarial review.

5. Unlawfulness of the Subsidy Proceeding.

Section 605(c) of the Merchant Marine Act, 1936, provides, inter alia, that no operating differential subsidy contract shall be made until after proper hearing of all parties; this is the only opportunity when competing non-subsidized carriers may be heard. That section expressly requires that:

> "The Board, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper."

Section 5(a) of the Administrative Procedure Act requires, inter alia, that persons entitled to notice of an agency hearing shall be timely informed of the time, place, and nature thereof and the matters of fact and law asserted. Section 10(a) of the Administrative Procedure Act provides, inter alia, that any person adversely affected or aggrieved by any agency action shall be entitled to judicial review thereof. The first application was not a matter of concern to plaintiff; the second application, for the subsidy of ships of a different type and size, carrying a different character of cargo, is of concern to plaintiff.

Thus, defendant Maritime Subsidy Board's failure to give due notice of the different proposal described in 4.

above and subsequent denial of the plaintiff's timely petition for reopening and reconsideration were in violation of the hearing requirements of the Merchant Marine Act, 1936, and the applicable sections of the Administrative Procedure Act.

6. Irreparable Injury.

If defendants are allowed to consummate the contract heretofore described, plaintiff will have to compete with a construction subsidized, operating subsidized U. S.-flag service without having had its rightful and lawful opportunity to show in open hearing that the trailership service to be provided by plaintiff will be adequate, and that the purposes and policies of the Merchant Marine Act, 1936, will not be served by additional vessels operating on the above described routes. The pricing advantage resulting from federal subvention to the subsidized carrier will result in a diversion of traffic from plaintiff, who will be without forum for redress of economic injury once the subsidy contracts have been effectuated.

WHEREFORE, plaintiff seeks a judgment;

(1) permanently enjoining defendants Connor, Johnson, Gulick, Davis, Hock, and Maritime Subsidy Board, and each of them, from making or causing to be made or consummating or causing to be consummated the said contracts, unless and until the Maritime Subsidy Board after due and proper hearing as required by Section 605(c) of the Merchant Marine Act, 1936,

finds that such contracts are in accordance with the standards of that Act,

(2) setting aside the Secretary of Commerce's order of October 4, 1965, and the Maritime Administrator/Maritime Subsidy Board orders of August 12, 1965, and September 1, 1965,

(3) granting such other and further relief as this court may deem necessary and proper in the premises.

[Subscription Omitted in Printing]

Dated: October 20, 1965

[Caption Omitted in Printing]

A N S W E R

Defendants and each of them answer the complaint herein as follows:

First Defense

The complaint fails to state a claim against defendants or any of them upon which relief can be granted.

Second Defense

The complaint fails to state a claim against defendants or any of them upon which relief can be granted because plaintiff does not have any or sufficient legal interest to give it standing to challenge the action herein of defendants or any of them.

Third Defense

1. Defendants and each of them deny the allegations of paragraph 1.

2. Defendants admit the allegations of paragraph 2.

3. Defendants and each of them deny the allegations

of paragraph 3 for lack of information sufficient to form a belief.

4. Defendants and each of them deny the allegations of paragraph 4 that the application of American Export Isbrandtsen Lines, Inc., on April 7, 1965 was not made public and deny that plaintiff had no knowledge that said application had been under consideration by defendants or any of them.

5. Defendant and each of them deny the allegations of paragraph 5 for lack of information sufficient to form a belief.

6. Defendants and each of them deny the allegations of paragraph 6.

WHEREFORE, defendants pray that the complaint herein be dismissed and that they have such other and further relief as may be just.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

December 22, 1965

FILED

MAR 31 1966

STEARNS, Clerk

[Caption Omitted in Printing]

MOTION TO INTERVENE AS A DEFENDANT

American Export Isbrandtsen Lines, Inc., (hereinafter AEIL), a corporation organized under the laws of the State of New York, with principal offices at 26 Broadway, New York, New York, duly qualified under the 1954 District of Columbia Business Corporation Act to transact business within the said District with an office at 2000 K Street, N. W.,

Washington, D. C., by its attorneys, respectfully moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the grounds that:

1. This is an action by Sea-Land Service, Inc., (Sea-Land), a common carrier by water in the domestic and foreign commerce of the United States, to enjoin the existing defendants from entering into or consummating an operating-differential subsidy agreement with AEIL covering two vessels to be operated by it in the foreign commerce of the United States in accordance with the provisions of Title VI of the Merchant Marine Act of 1936, as amended.

2. Subsequent to the actions of the Maritime Subsidy Board on August 13, 1965, approving operating-differential and construction-differential subsidy to AEIL for two containerships to be operated on Essential United States Trade Route No. 5-7-8-9, plaintiff Sea-Land (which did not serve the route at the time of the complained of actions, nor has it since commenced a service) petitioned the administrative agency to reopen for reconsideration its above mentioned actions. AEIL was a party to that matter, known as Docket No. A-19, wherein the Maritime Subsidy Board denied Sea-Land's petition on September 9, 1965.

3. Petitions for review by the Secretary of Commerce of the action of the Maritime Subsidy Board filed by AEIL on September 14, 1965 and by Sea-Land on September 20, 1965 were denied by Order of

October 4, 1965.

4. Sea-Land then commenced the instant action by the filing on October 20, 1965 of its complaint for injunctive relief which did not name AEIL as a party defendant, although it was susceptible to the jurisdiction of this Court.

5. The contract for construction-differential subsidy referred to in the complaint was executed prior to the filing of this suit, while many months of effort have gone into the negotiation of the operating-differential subsidy contract.

6. AEIL has made numerous binding and irrevocable commitments based in good faith upon the power and right of the United States of America to enter into the subject contracts as fully binding and effective agreements upon the Government.

7. The only deposition upon oral examination taken since the filing of the complaint on October 20, 1965 has been that of the President of AEIL.

8. Counsel for plaintiff and defendants have consented to applicant's intervention as a defendant.

9. Petitioner may or will be bound by any judgment against defendants in this action and the representation of its interest by the existing defendants may be inadequate.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

ANSWER OF INTERVENER
AMERICAN EXPORT ISBRANDTSEN LINES, INC.

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The complaint fails to state a claim upon which relief can be granted because plaintiff does not have such an interest as to give it standing to challenge the official actions of the government officials and the government's contracting procedures in relation to this intervener-defendant.

Third Defense

1. This intervener-defendant denies the allegations contained in paragraph 1 of the complaint

2. This intervener-defendant admits the allegations of paragraph 2.

3. This intervener-defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.

4. This intervener-defendant denies the allegations of paragraph 4 that the application of this defendant for operating-differential subsidy on Essential United States Trade Route No. 5-7-8-9 was ever denied; denies that a second application was filed; denies that the containership aspect of the application was not made public; and denies that plaintiff was

without knowledge that the agencies were considering the proposal until Maritime Administrator Johnson's announcement dated August 19, 1965.

5. This intervener-defendant denies the allegations contained in paragraph 5 of the complaint.

6. This intervener defendant denies the allegations of paragraph 6 of the complaint.

Fourth Defense

Plaintiff has waived the right to challenge the award of an operating-differential subsidy to this defendant by its failure to appear and contest the inadequacy of United States-flag service at the administrative hearing convened pursuant to Section 605(c) of the Merchant Marine Act of 1936, as amended, for that purpose. This intervener-defendant has been misled by plaintiff's earlier acts of omission in acquiescing to the Government's approval and in reliance thereon has changed its position and entered into irrevocable commitments. Plaintiff is therefore now estopped to deny the legality of the questioned actions.

WHEREFORE, intervener-defendant American Export Isbrandtsen Lines, Inc. prays for a judgment dismissing the complaint of the plaintiff and for such other and further relief as the Court deems just.

Richard W. Kurrus

RICHARD W. KURRUS

[Subscription Omitted in Printing]

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ORDER

This cause coming on to be heard on the motion of American Export Isbrandtsen Lines, Inc. for leave to appear as a party to and to intervene as a defendant in this action, and the Court having considered said motion and the Answer tendered therewith, and it appearing to the Court that all existing parties have consented to the motion and that the said American Export Isbrandtsen Lines, Inc. is entitled to become a party and should be permitted to intervene as prayed, and the Court being fully advised in the premises, it is

ORDERED, that American Export Isbrandtsen Lines, Inc. has leave to intervene in this cause and is hereby made a party thereto, and to that end its Answer may be received instanter in this cause in the same manner and with like effect as if named an original party defendant to this cause.

United States District Judge

Dated: ~~April~~ MARCH 31, 1966

No objection:

John Mason
Ragan & Mason
Attorney for Plaintiff

David G. Bress
United States Attorney

Leavenworth Colby
Attorney, Admiralty and Shipping Section
United States Department of Justice
Attorneys for Defendants

[Caption Omitted in Printing]

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
UNDER LOCAL RULE 9(h)

Plaintiff, Sea-Land Service, Inc., (Sea-Land) is this day filing a Motion for Summary Judgment against all Defendants in this cause of action. Pursuant to Local Rule 9(h), Plaintiff lists below forty-four material facts to which, Plaintiff submits, there is no genuine issue. The first forty-two facts are deemed to be admitted pursuant to Rule 36 of the Federal Rules of Civil Procedure. 1/

1/ Plaintiff filed a request for Admission, inter alia, of these facts on August 18, requiring, per Amendment of August 28, response by September 8. After two extensions were granted, all defendants responded on October 2. While defendants in the main admitted the correctness of the statements of fact, they "objected" to certain characterizations and made argumentative observations with respect to some of the statements of fact. Since, however, the defendants failed to serve upon plaintiff either:

> "(1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time."

As required by Rule 36, we consider the first forty-two statements of fact admitted.

The forty-third and forty-fourth facts are based upon the affidavit of Michael R. McEvoy.

1. At all relevant times American Export

Isbrandtsen Lines, Inc. (AEIL) or predecessors thereof, were party with the Maritime Administration, Department of Commerce (or predecessor agencies), to an Operating Differential Subsidy Agreement (ODSA), providing for the payment by the Maritime Administration to American Export Isbrandtsen Lines, Inc. (or predecessors) the subsidies authorized by Title VI, Merchant Marine Act, 1936, as amended (46 U.S.C. 601-613), in respect of wages and subsistence of officers and crews, marine and P&I insurance expense, and maintenance and repair expenses incurred in the operation of certain U.S.-flag vessels operated by American Export Isbrandtsen Lines, Inc. (or predecessors) on certain ocean services, routes and lines determined by the Maritime Administration (or predecessors) to be essential for the promotion, expansion, and maintenance of the foreign commerce of the United States, pursuant to Section 211, Merchant Marine Act, 1936 (46 U.S.C. 1121).

2. Article II-16(a) of the said Operating Differential Subsidy Agreement provides as follows:-

> "II-16. Competition. (a) Without the express approval of the United States, (1) neither the Operator nor any affiliate, subsidiary, associate, or holding company shall operate or cause or permit to be operated any unsubsidized vessel owned or controlled by any of them in competition with any subsidized service of the Operator or in

> the foreign commerce of the United States in competition with any other service, route, or line receiving financial aid pursuant to the provisions of the (Merchant Marine Act, 1936)."

3. At a meeting on March 5, 1962, the Maritime Administrator and the Maritime Subsidy Board granted to the predecessors of American Export Isbrandtsen Lines, Inc., pursuant to Article II-16,

> "-- permission to operate the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN carrying commercial cargo on a non-subsidized basis and on not more than 18 sailings per year at the rate of 1 or 2 sailings per month in the service between U.S. North Atlantic ports (Maine-Virginia inclusive) and ports in the United Kingdom, Republic of Ireland, and Continental Europe (from the northern border of Portugal to the southern border of Denmark).--."

The service between U.S. North Atlantic ports and the European area described formerly was designated as essential Trade Routes 5, 7, 8 and 9; is now designated as Trade Route 5-7-8-9.

4. The SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN are break-bulk vessels of the following particulars:

	SS REMSEN HEIGHTS	SS SIR JOHN FRANKLIN
Type	VC2-S-AP2	C 1 B
Length	439.1 feet	396.5
Breadth	62.1 feet	60.1
Draft	34.5 feet	25.8
Speed	15.5 knots	14.0 knots
Capacity for Cargo:		
a) In tons of 2240 lbs.	10,725	9,138
b) In cubic feet	453,000	451,000
c) In Meas. tons of 40 cu.ft.	11,325	11,275

5. American Export Isbrandtsen Lines, Inc., on February 24, 1964, applied for operating differential subsidy (Attachment 1, supra) for a minimum of 15 and a maximum of 26 sailings annually between U.S. North Atlantic ports and ports in the United Kingdom and Continental Europe (Trade Route 5-7-8-9) for the then existing non-subsidized service operated in that trade by the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN; the application was for operating differential subsidy in the operation of the two vessels on a regular schedule from and to U.S. North Atlantic calls (Norfolk, Baltimore, Philadelphia and New York), and with calls abroad in the areas of the Bay of Biscay (Bilbao, La Pallice, St. Nazaire or Bordeaux), Channel ports (Southampton, London or Le Havre), low countries (Antwerp, Rotterdam) and North Germany (Bremen/Bremerhaven, Hamburg).

6. As to the replacement of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, the application, at page 43, says:-

"E. Subsequent vessel replacement.
The Maritime Administration is

currently informed as to applicant's long-range vessel replacement plans for the rest of its fleet as outlined in Article 1.9(a)(2) of its subsidy agreement. It is contemplated that suitable replacement for the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, the subject of this application, will be agreed upon."

7. The "Notice of Application" (Attachment 8, supra) issued by the Maritime Administration, Department of Commerce, relating to the above described application for subsidy of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN was published in the Federal Register, issue of April 1, 1964 (29 F.R. 4686).

8. On May 21, 1964, a pre-hearing conference was held, pursuant to the Rules of Practice and Procedure of the Maritime Administration/Maritime Subsidy Board before a Hearing Examiner of the Maritime Administration/Maritime Subsidy Board; that, on May 25, 1964, in view of the lack of opposition to the application, the application was referred back by the Hearing Examiner to the Maritime Subsidy Board for administrative processing.

9. United States Lines Company is and at all relevant times was, an important operator of U.S.-flag ships, with operating differential subsidy, on Trade route 5-7-8-9; there was (Attachments 2 through 7, supra) an agreement between United States Lines Company and a predecessor of

American Export Isbrandtsen Lines, Inc., that in consideration of the withdrawal by American Export Isbrandtsen Lines, Inc.'s predecessor of their opposition to an application of United States Lines Company, United States Lines Company would not oppose an application for operating differential subsidy for the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN for operation on Trade Route 5-7-8-9.

10. (a) That no other or further "Notice of Application" or notice of hearing was published in the Federal Register or any other place in respect to the application of February 24, 1964, (Attachment 1, supra).

(b) No "Notice of Application" or notice of hearing was published in the Federal Register of an amendment or modification of the application of February 24, 1964, (Attachment 1, supra), in respect of (a) the ships for which subsidy was sought by the application or (b) the proposal of the application in respect to replacement of the ships for which subsidy was sought by the application.

11. (a) On February 8, 1965, the Office of Government Aid of the Maritime Administration, recommended to the Maritime Subsidy Board that the application for subsidy of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN be granted "on an interim subsidized basis pending replacement"; at a meeting of March 11, 1965, the Maritime Subsidy Board deferred action on that recommendation pending other develop-

ments which came to light in an application of American Export Isbrandtsen Lines, Inc., dated April 7, 1965, for operating differential subsidy on Trade Route 5-7-8-9, U.S. North Atlantic/United Kingdom and Continent (container service); at a meeting of August 11, 1965, the Maritime Subsidy Board by unanimous vote disapproved the recommendation of February 18, 1965, for subsidy of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN "on an interim subsidized basis pending replacement"; the application of February 24, 1964 (Attachment 1, supra) was denied.

(b) Attachment 9 correctly states the facts recited therein.

12. The application of February 24, 1964, was denied by the Maritime Subsidy Board; Attachment 10 correctly states the fact that the Maritime Subsidy Board denied the application of February 24, 1964, for operating subsidy of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN; in compliance with the last paragraph of the letter of September 10, 1965, (Attachment 10, supra) American Export Isbrandtsen Lines, Inc., indicated their acceptance of this denial by signing, dating and returning to the Secretary a copy of the said letter.

13. A a meeting of March 30, 1965, the Board of Directors of American Export Isbrandtsen Lines, Inc., authorized the filing of an application for, among other

things, operating differential subsidy on two vessels to be acquired and converted to containerships for operation on Trade Route 5-7-8-9; Attachment 11, supra, correctly describes the actions taken by the Board of Directors of American Export Isbrandtsen Lines, Inc., at a meeting of March 30, 1965.

14. The two vessels to be acquired by American Export Isbrandtsen Lines, Inc., or an affiliated company for conversion to containerships for operation on Trade Route 5-7-8-9 were ore carriers of the C5-S-77a dry bulk cargo vessel class, the SS TRANSINDIA and the SS TRANSORIENT.

15. The particulars of each of the two vessels before conversion were as follows:

Length Overall	538 feet
Breadth	78 feet
Draft	34 feet 9 inches
Design Sea Speed	16 knots
Dead Weight Capacity for Cargo	24,250 tons of 2240 lbs.

16. The following is a general description of the work done to convert the two ore carriers to containerships:

> " After all conversion work is completed the vessels will be capable of providing all necessary facilities for the efficient marine transportation of 702 standard 20' x 8' x 8' containers. The container cargo will be stowed both on deck and within the holds of the vessel.
>
> "Below deck container cargo will be stowed in fixed cellular guide structure; cargo container deck

loads will be carried atop the hold hatch covers and secured by individual portable fittings. Container cargo will be loaded and discharged via two shipboard mounted gantry cranes capable of extending outboard on either side of the vessel and of traversing longitudinally over the entire length of the cargo space. All accomodation and navigation spaces will be located at the after end of the vessel. Existing accommodation spaces at main and poop deck levels shall be reutilized. New accommodations for deck officer and new navigating spaces will be provided. Machinery spaces will, in general, not be altered by the conversion though certain automation or mechanization of control functions is contemplated."

17. The conversion of the two ore carriers to containerships was accomplished at a cost of over $7 million.

18. The two ships were renamed the CONTAINER DESPATCHER and the CONTAINER FORWARDER; the particulars of each vessel, after conversion, were:-

Length	582.7 3/4 feet
Breadth	78 feet
Draft	27.6 feet
Speed	16.5 knots
Capacity for Cargo	
a) In tons of 2240 lbs.	16,530
b) Containers	738 - 20' x 8' x 8' containers or 638 - 20' x 8' x 8' and 50 - 20' x 8' x 8' containers
c) Cubic capacity, containers	812,000 cu.ft. or 20,300 tons of 40cu.ft.

19. The application of April 7, 1965 (consisting in part of Attachments 12, 13, 14 and 15, supra) was supple-

mented by a letter of May 5, 1965 (Attachment 16, supra) and of June 2, 1965 (Attachment 23, supra).

20. At the time of the filing of the application of April 7, 1965, the Rules of Practice and Procedure of the Maritime Administration/Maritime Subsidy Board (46 CFR 201.71/201.185) provided in part as follows:

> "§ 201.71 Commencement of proceedings.
>
> " Formal proceedings may be commenced with respect to any phase of an application for Government aid or other relief, the processing of which by statute requires a public hearing. The Administration may, in its discretion, also direct the holding of a hearing not required by statute for any purpose authorized in the statutes it administers.
>
> "§ 201.72 Notice.
>
> " Notice of any matter which may result in or involves the institution of a formal proceeding will be given by publication in the FEDERAL REGISTER in sufficient detail and in sufficient time to apprise interested persons of the nature of the issues to be heard and to allow for an opportunity to file petitions for leave to intervene."

21. No notice of hearing in respect of the application of April 7, 1965, was published in the Federal Register or in any other place.

22. No notice of any sort in respect of the application of April 7, 1965, was published in the Federal

Register or any other place.

23. Applicant, American Export Isbrandtsen Lines, Inc., requested confidential treatment of the application in the following language:

> "The creation and implementation of a subsidized American-flag containership operation in the North Atlantic trade is obviously a matter of competitive delicacy, where opposing companies can use every moment of advance warning to burden, obstruct and discourage the potential success of such a new service. This proposal is offered under circumstances where it is hoped that it can be handled in complete confidence until the last possible minute. It is believed that preliminary administrative decisions can be made without publicity or public announcement until the date where plans and specifications for vessel conversion are sent to shipyards for bid."

24. By an exchange of letters (Attachments 17 and 18, supra) applicant, American Export Isbrandtsen Lines, Inc., agreed to the public release of some parts, but not all parts, of the application of April 7, 1965.

25. The Congressional Information Bureau (CIB) is a trade journal of general circulation in the shipping industry; the CIB issue of May 26, 1965 (Attachment 22, supra) correctly states the fact as at the time of the press release of May 26, 1965 (Attachment 21, supra) the application was still held confidential; that at some sub-

sequent time some parts, but not all parts, of the application were made available upon application to the Maritime Administration/Maritime Subsidy Board.

26. Containerships, including the CONTAINER DESPATCHER and the CONTAINER FORWARDER, are designed to carry under deck in cells and on deck containers which in turn are designed for interchange with other modes of transportation so that shipments may be loaded into the container at the point of origin and be moved in that same container without further handling of the goods themselves to the ultimate destination of the goods. In some instances cargo is loaded into the containers at the inland point of origin or at some other point away from the ocean carrier's receiving terminal and delivered to the ocean carrier's receiving terminal by rail or highway; in other instances the containers are loaded at the carrier's receiving terminal. In every case, the container itself is loaded into the containership. At the port of discharge the container itself is unloaded from the ship and in some instances turned over to connecting carriers for continuous transportation in the container to the ultimate destination; in other instances goods are removed from the container at the carrier's terminal and there delivered to the consignee.

27. (a) The SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN are break-bulk ships; the cargo space of the

SS REMSEN HEIGHTS consist of five cargo holds with two tween decks and the lower hold in Nos. 1, 2, and 3 and one tween deck and the lower hold in Nos. 4 and 5; the total capacity for is 453,000 cubic feet (or 11,325 measurement tons of 40 cu.ft.); the cargo spaces of the SIR JOHN FRANKLIN consist of five cargo holds, with two tween decks and a lower hold in Nos. 1, 2, and 3, and one tween deck and lower hold in Nos. 4 and 5 and the total capacity for cargo is 451,000 cubic feet (or 11,275 measurement tons of 40 cu.ft.).

(b) In the operation of break-bulk ships, including the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, cargo intended for loading to the ship is delivered to the receiving pier by motor vehicle, railroad car and floating equipment; cargo delivered by motor vehicle is unloaded from the motor vehicle onto the pier and then (or later) loaded into the ship's holds; cargo delivered by railroad cars and floating equipment is sometimes unloaded from the railroad car and floating equipment onto the pier and then (or later) loaded into the ship's holds, and sometimes unloaded directly from the railroad cars and floating equipment into the ship's holds. Except as stated in (c) hereof, the handling and loading just described is of the cargo in the original packages or shipping units appropriate to the particular commodities (e.g., bags,

cases, cartons, barrels, sacks, etc.). The cargo is lifted over the side of the ship and lowered into the cargo holds by means of rope or wire slings, stacks on pallets or platforms, or other appropriate means.

In the cargo holds, the cargo is separated (both horizontally and vertically) as between particular lots or types of commodities by wooden dunnage or other means of separation and safe keeping, as may be required by the mixture and nature of commodities loaded into particular holds. At the discharging port, the unloading and delivery operation is the reverse of the receiving and loading operation.

(c) Conventional break-bulk ships, including the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN do not contain cells for the carriage of containers. They can and do load and carry cargo in containers of a variety of sizes, but can carry large containers (e.g., 20 foot, 35 foot and 40 foot lengths) only on deck and, dependent on the size of the hatch opening, in the square of the hatch (i.e., the area directly under the hatch openings).

(d) A 20' x 8' x 8' cargo container measures 1,280 cubic feet; a 40' x 8' x 8' cargo container measures 2,560 cubic feet. On eleven voyages of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN (SIR JOHN FRANKLIN, Voyages 12, 14, 15, 22 and 23; REMSEN HEIGHTS, Voyages 13, 14, 15, 23 and 24), selected at random by American Export Isbrandtsen

Lines, Inc., the cargo manifests show that a total of eight containers exceeding outside measurements of 640 cubic feet were carried, as follows:-

> SS SIR JOHN FRANKLIN, Voy. 23, New York/Rotterdam manifest, sheet No. 8, two containers, each measuring 2,210 cubic feet.
>
> SIR REMSEN HEROMS, Voy. 22, Philadelphia/Bremen manifest, sheet No. 1, four containers, each measuring 1,200 cubic feet; New York/Rotterdam manifest, sheets No. 2 and 3, two containers, each measuring 2,210 cubic feet.

28. (a) Compared with break-bulk operations, a containership service affords savings and advantages to shippers and receivers, including the following:

(1) elimination of multiple handling;

(2) a substantial saving in insurance;

(3) through transportation of cargo with virtually no loss, damage or pilferage;

(4) elimination of expensive export packaging;

(5) more expeditious delivery; and,

(6) reduced transportation costs.

(b) Attachment 12 correctly states (page 10) that the savings and advantages to shippers and receivers which will result from containership service include the following:

(1) elimination of multiple handling;

(2) a substantial saving in insurance;

(3) through transportation of cargo with virtually no loss, damage or pilferage;

(4) elimination of expensive export packaging;

(5) more expeditious delivery; and,

(6) reduced transportation costs.

29. Attachment 14, in Schedule III, correctly states the fact that some commodities moving on Trade Route 5-7-8-9 are not suitable for containerization. These are, eastbound, bulk wheat, coke, coal, certain iron and steel products, unmanufactured tobacco, automobiles and trucks, linerboard, wood pulp and, westbound, automobiles, trucks, vehicles, certain steel mill products. Other commodities not suitable for containerization include certain types of heavy machinery, assembled agricultural machinery, and similar commodities exceeding the weight capacity or size of the containers employed.

30. (a) In respect to commodities moving on Trade Route 5-7-8-9 that are suitable for containerization, a container service has a competitive advantage over a break-bulk service.

(b) Attachment 14 at pages 143, 145, 147, 148 and Attachment 23 correctly describe some competitive

advantages of a containership service over the service of break-bulk vessels.

31. The SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN have no capacity for the transportation of refrigerated cargo; the container vessels, CONTAINER FORWARDER and CONTAINER DESPATCHER have capacity for up to fifty 40 ft. x 8 ft. x 8 ft. refrigerated containers.

32. On eleven voyages of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN (selected at random by American Export Isbrandtsen Lines, Inc., see above) those vessels carried on Trade Route 5-7-8-9 some commodities not suitable for containerization, including bulk grain, automobiles and heavy machinery.

33. Section 211 of the Merchant Marine Act, 1936, (46 U.S.C. 1121), authorizes and directs the Maritime Administrator to determine the ocean services, routes, and lines from ports in the United States to foreign markets which are or may be determined by the Administrator to be essential for the promotion, development, expansion and maintenance of the foreign commerce of the United States; prior to August 12, 1965, there had been no such determination in respect of containership services on Trade Route 5-7-8-9; on that date the Maritime Administrator

" Pursuant to Section 211 of the Merchant Marine Act, 1936,

as amended, found that the service described below is essential for the promotion, development, expansion, and maintenance of the foreign commerce of the United States:

"Trade Route 5-7-8-9 (Line I)
U.S. North Atlantic/United Kingdom and Continent (Container Service)

"A minimum of 18 and a maximum of 26 sailings per annum with suitable containerships on the berth service described as follows:

"Required - Between United States North Atlantic ports (Maine-Virginia inclusive) and ports in the following described area: Continental Europe (from the northern border of Spain to the southern border of Denmark).

"Privilege - A port or ports in the United Kingdom, Republic of Ireland and Northern Spain."

34. The affidavit annexed to Attachment 19 correctly states the facts that (a) Sea-Land Service, Inc., has operated containerships in the transportation of intermodal containers 35 ft. long by 8 ft. wide by 8 ft. 6 inches high for over ten years prior thereto; (b) that Sea-Land Service, Inc., was engaged for one year prior to August 31, 1965, in pre-inaugural activities for the establishment of containership services between U.S. North Atlantic ports and ports in western Europe (German ports and Rotterdam).

35. The Annual Report, 1964, of McLean Industries, Inc., dated March 19, 1965, reads in part as follows:-

"Consumation of our plans for expanding, during the next three years, including the opening of new routes in the Caribbean and to Europe will result in Sea-Land being both the leading container, sea-going carrier in the world and the only container carrier providing weekly service between intercoastal American ports. ---."

36. Sea-Land Service, Inc., inaugurated containership service from the port of Elizabeth, New Jersey, to Rotterdam, Bremen and Grangemouth in March, 1966, and have maintained weekly sailings continuously since that time. The containerships operated by Sea-Land Service, Inc., on this route have a capacity for 998-35 ft. containers, including refrigerated containers.

37. American Export Isbrandtsen Lines, Inc.'s CONTAINER DESPATCHER entered into service on Trade Route 5-7-8-9 on October 17, 1966, and the CONTAINER FORWARDER on February 10, 1967. At those times the containership service of Sea-Land Service, Inc., in that trade already was in operation. The containership service of American Export Isbrandtsen Lines, Inc., operates on a fixed itinerary between New York, Felixstowe, England, Amsterdam, Bremen and Le Havre.

38. An Operating Differential Subsidy Agreement between Maritime Administration/Maritime Subsidy Board

and American Export Isbrandtsen Lines, Inc., for subsidy of the CONTAINER DESPATCHER and the CONTAINER FORWARDER was executed on June 30, 1966, with subsidy payable on insurance, and wages of officers and crews.

39. The containerships operated by Sea-Land Service, Inc., receive no operating differential subsidy; Sea-Land Service, Inc., have not received construction differential subsidy in the construction or conversion of containerships.

40. On eleven voyages of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, selected at random by American Export Isbrandtsen Line, Inc., no cargo was carried to and no calls were made at ports in the United Kingdom. The CONTAINER DESPATCHER and the CONTAINER FORWARDER call regularly and provide service to and from the United Kingdom. The containerships of Sea-Land Service, Inc., call regularly at and provide service to and from the United Kingdom.

41. On eleven voyages of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, selected at random by American Export Isbrandtsen Lines, Inc., two voyages carried wheat in bulk, one voyage 6,700 tons of 2,240 pounds, the other 7,000 tons of 2,240 pounds. Bulk wheat in lots of 6,700 and 7,000 tons cannot be carried economically in 20-foot, 35-foot, or 40-foot containers in containerships in

competition with break-bulk ships.

42. Of a total of 14,387.8 tons (2,240 pounds) of general cargo carried eastbound on eleven voyages of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, selected at random by American Export Isbrandtsen Lines, Inc., 3,117.9 tons (2,240 pounds) or 21% was destined to Bilbao and Santander, in Spain, and La Pallice and St. Nazaire in France. The CONTAINER DESPATCHER and the CONTAINER FORWARDER do not call at Bilbao, Santander, La Pallice or St. Nazaire. American Export Isbrandtsen Lines, Inc., has applied for operating differential subsidy for break-bulk vessels operated by them in another Trade Route to call at Bilbao and Santander, formerly served by the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN operating in Trade Route 5-7-8-9.

43. At the time of ABIL's original application in February of 1964 and at the time of ABIL's second application in April, 1965, Sea-Land Service, Inc., was an affiliate of Waterman Steamship Company, which was then an unsubsidized U.S.-flag carrier in the foreign commerce of the United States, operating, inter alia, on the relevant route. On June 30, 1966, when the operating differential subsidy contract was actually entered into, Sea-Land Service, Inc., was operating on the relevant trade route in its own right.

44. The management of Sea-Land Service, Inc., had no knowledge that the Maritime Administration/Maritime Subsidy Board (MA/MSB) was administratively processing ABIL's application of April, 1965, until approval thereof was announced by the MA/MSB on or about August 19, 1965.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SEA-LAND SERVICE, INC., Plaintiff, v. JOHN T. CONNOR, et al., Defendants.	)	Civil Action 2614-65

Washington, D. C.

April 10, 1968.

The above cause came on for hearing of motions before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:

JOHN MASON, ESQ.,
EDWARD M. SHEA, ESQ.

For the Government Defendants:

LEAVENWORTH COLBY, ESQ.
Attorney, Dept. of Justice

For the Intervenor-Defendant:

RICHARD W. KURRUS, ESQ.

- - -

P R O C E E D I N G S

THE DEPUTY CLERK: Sea-Land Service, Inc. v. John T. Connor individually and as Secretary of Commerce and others, Civil Action 2614-65.

MR. MASON: For the plaintiff, John Mason. My name does not appear on the calendar.

THE COURT: Are these cross-motions here or is it only the plaintiff's motion?

MR. MASON: Just the plaintiff's motion. There is no cross-motion.

THE COURT: You may proceed.

MR. MASON: We are here, Your Honor, on a motion for summary judgment.

The complaint is brought under Section 605(c) of the Merchant Marine Act of 1936 and the relevant provisions of the Administrative Procedure Act.

The complaint alleges --

THE COURT: What is the action about?

MR. MASON: The complaint alleges essentially --

THE COURT: Tell me what the action is about before you go into the allegations of the complaint.

MR. MASON: The case is that the Maritime

Subsidy Board and the Maritime Administration, in awarding subsidy to a competitor of Sea-Land --

THE COURT: In awarding what?

MR. MASON: Operating differential subsidy to a competitor of Sea-Land, did so without compliance with the hearing and notice requirements of the Act, and that we are aggrieved thereby.

THE COURT: Gentlemen, it occurs to me, judging from the number of counsel and the voluminous papers, that this argument may take a little time. I think I would rather dispose of the next case first and then come back to you.

MR. MASON: Very well, sir.

- - -

THE COURT: Now we will go back to the Sea-Land case.

MR. MASON: Sea-Land Service, the plaintiff, Your Honor, is engaged in transportation of cargo by inter-nodal containers and the use of container ships in moving the cargos from port to port.

The operation has been since the early 1950s

in the domestic trades --

THE COURT: You claim that the Maritime Commission acted without regard to the procedure prescribed by law, is that it?

MR. MASON: That is the contention.

I might add that it is the Maritime Subsidy Board.

THE COURT: I don't think I need all the factual questions, then. Suppose you address yourself to that.

MR. MASON: The essential factual situation is this:

That a competitor of Sea-Land, American Export Isbrandtsen Lines, were operating in the North Atlantic trade two break-bulk cargo vessels --

THE COURT: Tell me what is the order of the Board that you object to, that you seek to review.

MR. MASON: Yes, sir. The order of the Board that we object to is their award of subsidy to Export without the hearing that we consider to be required by Section 605(c).

THE COURT: They awarded what?

MR. MASON: Operating differential subsidy.

THE COURT: To a competitor of yours, without adhering to the procedure prescribed by statute?

MR. MASON: That is the situation, yes, sir.

THE COURT: Very well. Suppose you address yourself to that question.

MR. MASON: Yes. Well, the facts are quite complex, Your Honor.

THE COURT: I don't want to know the complex facts if they are not relevant.

You claim that the statute was not complied with. Now suppose you address yourself to that.

MR. MASON: All right, sir. Fine.

THE COURT: You know, it is so much better for counsel to pick the one point in the case --every case depends on one point, you know-- and argue that one point.

MR. MASON: Thank you.

Export applied in 1964 for subsidy on two break-bulk vessels. These were vessels that they were operating in the North Atlantic trade without subsidy. However, because they had subsidy in other trade routes they could not perform this operation without the permission of the Subsidy Board and that permission limited their

sailings to 18 sailings per year.

In 1964, having operated these ships in the trade without subsidy for some time, they applied for operating differential subsidy on those two ships.

The Maritime Subsidy Board noticed for hearing --

THE COURT: Will you tell me wherein the statute was not complied with? That is your point, isn't it?

MR. MASON: Yes, it is.

THE COURT: Start with your conclusion.

I think every legal argument should start with its conclusion because the element of suspense is superfluous in a legal argument. Then I can follow the argument if I know what your conclusion is.

MR. MASON: Very good. I certainly don't mean to hold you in suspense.

The Subsidy Board awarded subsidy for the operation of two container ships in the trans-Atlantic trade. These two container ships were ships that --

THE COURT: Will you tell me wherein the statute was violated? You have to adjust your argument to the Court.

MR. MASON: Yes. Fine. The statute was violated

in that there was no notice and hearing required by Section 605(c) for the award of subsidy to the two container ships --

THE COURT: What is the citation to the statute?

MR. MASON: Section 605(c), Merchant Marine Act, 1936 --

THE COURT: No, give me the Code citation.

MR. MASON: Title 46, 1175.

THE COURT: Now you may proceed.

Your contention is that the statute requires notice of hearing and none was given, is that it?

MR. MASON: That is my contention, sir.

THE COURT: Very well.

MR. MASON: I must, sir, revert to the fact that there was another application and that was for an application for subsidy of the two break-bulk ships that I was describing a moment ago. There was notice of that application. There was a hearing offered. There was no opposition to the subsidy of those two break-bulk ships and the Examiner referred the matter to the Maritime Subsidy Board for administrative processing from that point on.

THE COURT: That is some other ships than are involved here?

MR. MASON: That is correct.

THE COURT: What about this one?

MR. MASON: Thereafter, without any further notice or hearing, the Maritime Subsidy Board awarded subsidy on two different ships, two container ships which, as we developed in our papers, perform a quite different transportation service than the break-bulk ships.

The position of the Subsidy Board has been that somehow or another, and I can only develop this by detail, the position of the Subsidy Board is that somehow or another the notice and hearing that was offered in respect of the application for the two break-bulk ships was a sufficient compliance with Section 605(c) for them to award subsidy on the two container ships, and we say that this is simply not so.

THE COURT: Very well. Suppose I hear the other side and let you reply.

MR. MASON: All right, sir.

MR. KURRUS: If it please the Court, my name is Richard W. Kurrus and I represent American Export

Isbrandtsen Lines --

THE COURT: No, I think I ought to hear the Government first.

MR. KURRUS: Very well. The only reason I stood up, Your Honor --

THE COURT: I will hear the Government first. This is a suit against the Government.

MR. COLBY: May it please the Court, my name is Leavenworth Colby. I represent all the Governmental defendants in the case.

This, as Mr. Mason has told you, is a claim by a steamship line that they should have had notice and opportunity to present testimony.

THE COURT: Yes, I understand that is their claim. Now what is your reply to that?

MR. COLBY: Our reply to that is that the particular section of the statute which is in dispute here does not require the giving of notice and the holding of a hearing in the circumstances of this case.

Now we have set out in the Government brief --

THE COURT: No, you tell me orally everything you want me to know. A brief is only auxiliary.

MR. COLBY: We have set out at page 5 the provision from the section of the Code which gives rise to the problem. Now that is, as Your Honor has already been told, is this Code Section 46 U.S.C. 1175(c).

Now this statute is somewhat peculiar in its terms. It begins by saying:

> "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line" —

THE COURT: What is your point, Mr. Colby? It is easier for me to follow an argument if I know the conclusion that counsel seeks to demonstrate.

MR. COLBY: The conclusion of the argument is that this provision of the statute does not require the holding of a hearing if the Administration finds ex parte certain facts which they found in this case.

THE COURT: I see. Very well.

MR. COLBY: Those are described in Subsection (c):

> "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of

the United States which would be in addition to the existing service, or services . . ."

And those are the magic words.

". . . unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act" --

THE COURT: Yes, I have it before me. I have the Code before me.

MR. COLBY: All right.

Now, you see, what the administrative agency has done is to find that the service in this case was not an additional service.

In other words, American Export Isbrandtsen, the party to whom the subsidy was made, was already operating an existing service. The Administration found that they were operating such an existing service and, therefore, found that they didn't have to have a hearing and didn't have to notice a hearing.

Now, Mr. Mason's contention, in short, I take

it to be, is that the Administration erred in its judgment as to whether the pre-existing service was sufficiently comparable, substantially comparable to the service which was supposed to be subsidized. The Government decided it was. He contends it is not.

Now as he started to explain to Your Honor, the service was formerly made --

THE COURT: Let me see if I understand you. Is it your contention that the statute should be construed as follows: that if the service would be in addition to existing service, then a hearing is necessary?

MR. COLBY: Yes, sir.

THE COURT: If it is not in addition to the existing service, then no hearing is necessary?

MR. COLBY: That is right.

THE COURT: But who is to determine that?

MR. COLBY: The Administration.

THE COURT: In other words, the Board determines the very fact whether a hearing is necessary.

MR. COLBY: That is right.

THE COURT: That seems rather extraordinary, doesn't it?

MR. COLBY: Well, there are many similar cases involving grants of subsidy, grants of contracts.

THE COURT: Has this point --

MR. COLBY: This point is res integra; it has never been decided yet. This is the first case in which it has come up for litigation.

THE COURT: I think the Board should have been on the safe side and held a hearing.

MR. COLBY: Well, frankly, I suppose that, like every lawyer, if I had been doing it I might have done it that way too.

THE COURT: I think you would have. I think if they asked your advice you would have said go ahead and hold a hearing.

MR. COLBY: However, if Your Honor please, the feeling was that, apparently, in the Administration, that, one, it was unnecessary under the strict language of the statute; two, it would take a prolonged amount of hearings, and so they decided not to.

THE COURT: That is their own fault, to have hearings prolonged. They can have short hearings too, you know. I have noticed over the years --so have lots of

other people-- that administrative agencies have a way of holding prolonged hearings and running up thousands of pages of testimony. Probably the paper manufacturers benefit by that. While, at the same time, the courts dispose of matters very briefly.

MR. COLBY: Well, it always does something for the reporters.

At any rate, the case we are seized of here is one in which they concluded that under this provision they didn't have to hold a hearing.

That, in turn, turns on the question of whether the service proposed to be subsidized was substantially an existing service.

The existing service was made with break-bulk vessels. The proposed service to be subsidized was to be made with container ships. And that is what the nub of the controversy here today is.

THE COURT: The service to be subsidized, you claim, was an existing service and not an additional service?

MR. COLBY: Yes, sir.

THE COURT: Is there a factual dispute about that?

MR. COLBY: I don't think there is. There is a

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THE COURT: The service to be subsidized, you claim, was an existing service and not an additional service?

MR. COLBY: Yes, sir.

THE COURT: Is there a factual dispute about that?

MR. COLBY: I don't think there is. There is a

dispute of interpretation.

The problem, of course, if Your Honor please, you will recall, is essentially the same as that of the grandfather clause rights in the Motor Carrier Act and the Inland Waterways Act. In other words, in those Acts there must be a bona fide pre-existing operation. This has been held by the ICC and review by the courts, including the Supreme Court, to be a matter of substantiality. In other words --

THE COURT: But whether a service is additional or whether it is already existing is a question of fact, isn't it?

MR. COLBY: Yes, sir.

THE COURT: And the Board passed upon the question of fact?

MR. COLBY: That is right. And we have the various matters which constitute the hearing -- the record which they passed upon.

THE COURT: Is this a review on the record?

MR. COLBY: I take it it is.

THE COURT: Do all counsel agree this is a review on the record?

MR. KURRUS: I don't believe I got your whole question.

I want to say I don't agree with Mr. Colby's interpretation of the statute.

THE COURT: What is your contention?

MR. KURRUS: Well, my contention is that a hearing is required under Section 605(c) in either case, whether the man --

THE COURT: Then what is your position in this case?

MR. KURRUS: My position is, Your Honor, that at the time that all of the relevant administrative determinations were made, Sea-Land was not --

THE COURT: You contend that a hearing is required?

MR. KURRUS: A hearing is required.

THE COURT: No hearing was held. Then what is your position?

MR. KURRUS: Sir, the matter was noticed in the Federal Register. Only one person intervened and that person, at the time of the pre-hearing conference, withdrew its intervention. Therefore, the Examiner forwarded the matter up to the Board.

THE COURT: You have stated your position. I didn't want to interrupt Mr. Colby, but I wanted to see whether everybody concurred with you, Mr. Colby.

MR. COLBY: That is all right, if Your Honor please.

This position has to do with the fact that this particular plaintiff lacked standing to maintain the action. We were at this point discussing the statutory problem and how the Maritime Administration solved it.

This addresses itself to the fact that the plaintiff in this action was not a competitor at the time they sought to intervene in the proceeding.

THE COURT: I am going to ask the question again: Do all counsel agree that this is a review on the record, or is this a case where there can be a trial de novo?

MR. MASON: There is no record, Your Honor, of an evidentiary hearing.

The record that Mr. Colby refers to is our petition to the Subsidy Board for reconsideration and the pleadings on that. Apart from that, the only factual matters before you are the facts developed through requests

for admissions and affidavits which support our motion.

THE COURT: I want to cut through the preliminary question concerning the posture of this case.

There is no record because there was no hearing, is that your contention?

MR. MASON: That is it, sir.

MR. KURRUS: I disagree with that. There is a record in the sense that we have before us a record of the administrative determinations.

A record is more than a record that is made at a public hearing.

THE COURT: Mr. Colby, I would like to get the Government's view. Is this one of those proceedings where the parties are entitled to a trial de novo and an evidentiary hearing, or is it to be determined on the record of the Board?

MR. COLBY: Because it is in our view a matter which is of discretion with the Maritime Administration and subject to review only for abuse of discretion, there would be no trial de novo.

On the other hand, the Court would be required to review the findings, conclusions, and the data as

disclosed by the administrative agency in taking the decision.

THE COURT: I am inclined to the view that the question whether a hearing is necessary is not within the discretion of the Board.

Assuming your contention is correct as to the construction of the statute, there is a question of fact as to whether this was an existing service or an additional service, is there not?

MR. COLBY: That is right, as to whether the service to be subsidized --

THE COURT: The Court has to review that question, doesn't it?

MR. COLBY: That is right.

THE COURT: Shouldn't the Court take testimony on that?

MR. COLBY: I don't think it should.

THE COURT: What basis is there for review?

MR. COLBY: You review an act of discretion for reasonableness on the basis of the data that was before the Administrative Agency when it took the decision.

THE COURT: Of course, the presumption is -- a

presumption of regularity attaches to the actions of any administrative agency; but subject to that there is a question of fact to be reviewed, is there not, namely, whether this was an additional service or an existing service?

MR. COLBY: But that question of fact, if Your Honor please, is a question of inference. In other words, there isn't any factual dispute about the fact --

THE COURT: Let's assume that it is a question of inference. But what is there before the Court on the basis of which the Court can review that inference, unless the Court takes evidence? There was no evidentiary hearing held by the Board.

MR. COLBY: That is right. The Court is reviewing the decision of the administrative authority that on the basis of certain undisputed facts, facts undisputed by the parties, which are recited in the administrative record, that this did not constitute a new or additional service.

In other words, what the Administration decided was that a change from break-bulk vessels to container ship vessels did not constitute a substantial addition of service; or stated the other way around, that the pre-

existing break-bulk service was substantially the same thing as the proposed service to be subsidized.

Now this is a matter which the Court --

THE COURT: The Government did not make a cross-motion for summary judgment.

MR. COLBY: We put in our prayer, at the conclusion of the brief, that this is a matter which is susceptible of decision by the Court on the basis of the papers before it. In other words, Mr. Shea has put forward --

THE COURT: Does any counsel claim a right to introduce evidence on that issue, or do all the parties agree with Mr. Colby that the Court can decide that upon the submitted papers?

MR. KURRUS: I don't agree it is an issue.

THE COURT: Just a moment.

MR. MASON: The admitted facts, Your Honor, show that the service performed --

THE COURT: No; suppose I repeat the question, gentlemen, and suppose you follow it carefully.

Does any party claim the right to introduce evidence on the issue whether this was additional service or existing service?

MR. MASON: We don't claim the right to introduce evidence. We have supported our motion with admitted facts which we think are sufficient.

THE COURT: You don't claim the right to introduce evidence?

MR. MASON: That is correct.

THE COURT: In other words, you agree with Mr. Colby that the Court may decide the matter on the submitted papers?

MR. MASON: On the submitted papers, yes, sir.

THE COURT: What do you say?

MR. KURRUS: Well, I say if you are going to determine that question of whether or not you have to hold a hearing to determine whether a matter is an existing service, it is essentially a question of law. I don't think it is an issue in this case and the Board didn't proceed on that basis.

The Board never took this approach, that a hearing wasn't necessary under 605(c).

THE COURT: I am not going to decide the case piecemeal.

Well, if I sustain the Government's contention

as to the interpretation of the statute, then the question of fact whether this was existing service or not is the point that the Court has to decide. Do you agree with that, Mr. Colby?

MR. COLBY: That is right.

THE COURT: Now my question to counsel was whether any counsel claims the right to introduce evidence on that issue.

I am inclined to agree with Mr. Colby's contention as to the interpretation of the statute, although the statute is rather strange.

Now what do you claim as to that?

MR. KURRUS: On the question of producing evidence? You say what do I claim and you never completed the question.

THE COURT: I asked the question twice, I will ask it a third time, does any party claim the right to introduce evidence on the question as to whether this was new or existing service, or are the parties ready to rest upon the papers submitted?

MR. KURRUS: We are willing to rest on the basis of the papers submitted.

THE COURT: You do not claim the right to intro-

duce additional evidence?

MR. KURRUS: No, sir.

THE COURT: Very well.

Now, I think we will recess and finish this after the noon recess. We will have to take a somewhat longer recess than we ordinarily do. We will recess until 2:30.

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AFTERNOON SESSION

THE COURT: We will resume the case on hearing. You may proceed.

MR. COLBY: Now, if Your Honor please, we described the position with respect to the statute. I would like to say a word about how it was that the question was posed of dealing with the statute in this way.

As Mr. Mason said to you in the beginning, there had been an original application for initial subsidy on an existing service maintained with break-bulk vessels. A notice was published in the Federal Register of April 1, 1964 that the Maritime Administration invited intervention in this proceeding and that it would hold hearings if

proper applicants with sufficient interest appeared.

In other words, they started off with the expectation that whether or not they were required under the terms of the statute, they were going to have a hearing if somebody came around and wanted to have one.

Waterman Steamship Company, which like Sea-Land is a subsidiary of the McLean Trucking interests, did appear and intervene. When the case was set for pre-hearing conference, however, Waterman withdrew. No one else appeared. The Hearing Examiner referred --

THE COURT: Suppose you get to the point.

MR. COLBY: Well, I think it is a little easier if, like with the college professor, we begin with Aristotle or the amoeba.

We then have the Hearing Examiner referring the matter back to the Board. At this point the Board made the determination that there was an existing service and --

THE COURT: Well, the question was whether the change-over was an additional service.

MR. COLBY: Yes. Now at this point, because they didn't want, apparently, to subsidize the old break-

bulk vessels, the case was held over a while and an amended or substituted, as my brother would have it --

THE COURT: Just what was the change?

MR. COLBY: Thechange consisted in, instead of subsidizing the two break-bulk vessels, they were to subsidize two container ships.

THE COURT: Two what?

MR. COLBY: Container ships. Container ships are ships that are made to have cellular units so they load on and off easier. I am sure Your Honor is sufficiently familiar with the state of the art, probably just as familiar with it as I am.

Now at this point they did not feel it was necessary to give notice of any formal hearing because they were able to determine that this was substantially the same thing as the existing service, and that is how the case is presented in the form it is now.

When the decision was announced, then Sea-Land sought to intervene and have the matter reopened and reconsidered, and the record that we have before the Court today arises in connection with that application for reconsideration, which was denied.

THE COURT: By whom?

MR. COLBY: By Sea-Land.

THE COURT: The competing company, is that it?

MR. COLBY: Yes, the company that is plaintiff here, as opposed to the company that was being subsidized.

And that, in a word, is the way we have it.

Now we therefore --

THE COURT: I wish you would be brief and get to your point without a discursive history, Mr. Colby.

MR. COLBY: All right. I think I have arrived at the point, then.

Now, then, there is a third subsidiary point in the case and that is that Sea-Land was not an operating competitor on this route at that time. Therefore, the Subsidy Board and the Secretary were of the view that, additionally, they lacked standing because they were not an actual competitor. They didn't come --

THE COURT: Where does all this appear in the record, what papers are there before the Court?

MR. COLBY: There are some three inches of documents which are summarized in my friend's statement of material facts.

THE COURT: I have to have the papers before me in a separate set in order that I could see what I have to pass upon. Have I a record before me?

MR. COLBY: I think that Mr. Mason --

THE COURT: I am not going to incorporate by reference.

MR. COLBY: I believe Mr. Mason handed up to you the material facts.

THE COURT: Mr. Mason handed up his motion for summary judgment, his statement of material facts --

MR. COLBY: Now that is keyed to some three inches of documents, if you please, and those he didn't hand up. To put it another way, Judge, he didn't threaten you with it.

THE COURT: I don't want three inches of documents. I want only the one or two things that are before me.

MR. COLBY: They are, I believe, summarized in that Material Facts Statement.

THE COURT: Does anybody question the plaintiff's statement of material facts?

MR. COLBY: We may question some of his interpretations, but that is a matter of briefing and argument.

Facts, as facts, I take it there is no dispute about.

THE COURT: Under Rule 9 did you file a counter-statement?

MR. COLBY: No.

THE COURT: Very well. Then I admit this.

MR. COLBY: Yes, we accept them, subject to interpretation, like all statements of this sort.

THE COURT: I am going to read that statement. I am not going to decide that now.

MR. COLBY: Thank you.

THE COURT: Doesn't the question come down to this: whether the change-over constituted an additional service?

MR. COLBY: That is right.

THE COURT: Let me ask you another question. You gave a notice of hearing as to the original cargo ships.

MR. COLBY: Yes, sir.

THE COURT: When I say "you" I mean the Board.

Then, instead, however, it gave a subsidy to these container ships, is that what you call them?

MR. COLBY: That is right.

THE COURT: Instead of the cargo ships.

MR. COLBY: That is right.

THE COURT: Well, it considered the cargo ships additional service but it considered the container ships not additional service?

MR. COLBY: It considered both to be not additional service.

THE COURT: But they gave a notice of hearing as to the first.

MR. COLBY: Maritime has a habit of giving notice in substantially all of these cases, and I'd like to direct Your Honor's attention to the form of the notice. We have set it out in our brief at page 7, it's Attachment 8. The language is this:

> "If the Maritime Subsidy Board determines that petitions for leave to intervene filed within the specified time do not demonstrate sufficient interest to warrant a hearing, the Maritime Subsidy Board will take such action as may be deemed appropriate."

And they took this action that was deemed appropriate and the result of the action --

THE COURT: Did the same line operator own both

the two cargo ships and the two container ships?

MR. COLBY: The proposal was in connection with a construction subsidy also, which is not here in litigation. In other words, they were going to build the container ships.

THE COURT: Just a moment. I will repeat my question. As I understand it, the notice of hearing was in respect to the two freight ships. The allowance of the subsidy was in regard to two other ships, is that it?

MR. COLBY: That is right.

THE COURT: Now apparently the Commission or the Board must have regarded the first couple of ships as being additional service.

MR. COLBY: No.

THE COURT: Then why did they give notice?

MR. COLBY: They gave notice because it is their practice to invite interventions to hear what anyone wants to say. This is the business of --

THE COURT: Then why didn't they do the same thing as to the two container ships?

MR. COLBY: Because at the time of their consideration, subsequent to the first notice, they had reached

the conclusion that there was no necessity for a hearing. The reason they reached that conclusion was they had already discovered that it was not a substantial change in service and it would not be unduly advantageous or unduly prejudicial.

THE COURT: You have answered my question.

Now the next question I want to ask you is this: Did the Board decide this matter on the ground that no hearing was necessary or on the ground that the objectors had no standing to object?

MR. COLBY: It seems to me that a fair reading of the opinion is on both grounds.

THE COURT: Is there an opinion of the Board?

MR. COLBY: Yes, there is.

THE COURT: Oh, yes. Very well.

MR. COLBY: It is with the documents. It is one of the essential ones.

THE COURT: Very well.

MR. COLBY: Thank you.

THE COURT: I get your point.

Does anyone else care to be heard?

MR. KURRUS: Yes, I would like to be heard.

If it please the Court, my name is Richard

Kurrus. I represent American Export Isbrandtsen Lines.

THE COURT: Speak up so you can be heard. You are in a big room with a high ceiling. This is not an office conversation. Now whom do you represent?

MR. KURRUS: American Export Isbrandtsen Lines. It's a Danish line; an American company, however.

THE COURT: They are the people who are objecting to this --

MR. KURRUS: We are the people who have been subsidized --

THE COURT: Are they the people who are objecting to the award or are they the people who have been subsidized?

MR. KURRUS: We are the people who have been subsidized.

THE COURT: And you are intervening in support of the decision of the Board?

MR. KURRUS: Yes, sir, we are intervening as a defendant.

I would like to address myself to the last question that you asked. You asked, as I understand it, whether or not the Board held that there wasn't any hearing necessary because of the absence of intervenors or because

a hearing wasn't necessary on the ground of existing service, and I'd like to state that they held on neither of those questions. They didn't decide this case on the basis of --

THE COURT: I am going to accept Government counsel's contention as to what the Board decided. He represents the Board.

MR. KURRUS: Right. Well, I would like --

THE COURT: Sometimes administrative agencies, just as courts sometimes, don't articulate their reasons very clearly.

MR. KURRUS: Well, Judge Holtzoff --

THE COURT: What is your point?

MR. KURRUS: I just don't want to see you go off on a ground that they didn't decide.

Attachment No. 31 and Attachment No. 32 are the decisions of the Board.

THE COURT: I am going to read the decisions.

Now what point do you want to make? We don't hear intervenors at length, you know.

MR. KURRUS: Certainly. I want to make the point that the Board never found that we had an existing

service. They never found this point at all. They found that the trade was inadequately served. This is the finding that they made after they had published the notice in the Federal Register.

Now, I want to say this, that there are two critical issues that are raised by the complaint. One is that they really didn't have notice when the application was -- notice of the application was first published in the Federal Register that American Export Isbrandtsen Lines intended to put container ships into the trade; and the second point is that --

THE COURT: What is the first point?

MR. KURRUS: The first point is that Sea-Land says it never expected that when American Export filed this original application on February 24, 1964 and when it was published in the Federal Register, that they never knew that Export was going to replace those vessels. That is their first point.

Their second point is that when Export finally did propose to the Board to replace the vessels, that that constituted a new application.

Those are the two critical issues that, as I

see it, that the complaint --

THE COURT: Constituted what?

MR. KURRUS: I didn't say constituted. I said those are the two critical issues that the complaint raises.

THE COURT: What did you say was the critical issue?

MR. KURRUS: The two critical issues? The two critical issues that the complaint presents are, first of all --

THE COURT: You told me the first one. What is the second critical issue?

MR. KURRUS: The second one is whether or not the proposal of Export to put two new vessels into the trade constituted a new application that had to be noticed in the Federal Register.

Now, then, it seems to me that the whole record that is before you is constituted in really two documents, and those are Attachments 31 and 32 to the complainant's or the plaintiff's proposed findings of fact, and those are the opinions of the Maritime Subsidy Board.

I want to say this, Judge Holtzoff --

THE COURT: No; when the Court is in session

you don't address judges by name. You say, if the Court please.

MR. KURRUS: I'm sorry. If the Court please.

THE COURT: Courts are impersonal.

MR. KURRUS: I see.

THE COURT: That is the reason English judges wear wigs, to emphasize their impersonality.

MR. KURRUS: I forgot myself for a moment, Your Honor.

THE COURT: In chambers you can address a judge by name informally.

MR. KURRUS: It seems to me, if the Court please, that these opinions of the Board constitute the whole record in this proceeding. There were depositions taken, but there hasn't been any new material or relevant fact developed.

THE COURT: Very well. I have your point.

MR. KURRUS: Now with respect to the suggestion by Sea-Land that they did not have notice that the vessels were going to be replaced, I want to say that the two vessels that were the subject of the application filed on February 24, 1964 were war-built ships. If they were still

operating in the trade they would be approximately 24 and 25 years old.

THE COURT: I don't care about that. I am not going to go into those facts. I am only going to determine the question whether the Board acted illegally. That is my sole jurisdiction. I cannot substitute myself for the Board.

MR. KURRUS: I just want to say this, that nobody could assume that those vessels could operate in the trade for very long; they would have had to be replaced. Now the Board --

THE COURT: Will you please not repeat something that I told you I won't consider.

MR. KURRUS: Certainly.

THE COURT: Counsel must realize that in reviewing an action of an administrative agency the courts cannot substitute themselves for the agency, all they can do is to see whether the agency exceeded the law or violated the law.

MR. KURRUS: Could I ask would it be presumptuous, Your Honor, if I asked you to read along with me part of the Board's opinion of September 9, 1965?

THE COURT: What opinion?

MR. KURRUS: The opinion of the Maritime Subsidy Board which is the subject of this --

THE COURT: Of course. I have a copy of it and I am going to read it. That is why I am not going to decide the matter this afternoon, because I want to take these papers home and read them.

MR. KURRUS: I wonder if we might read just part of it together.

THE COURT: No.

MR. KURRUS: All right.

THE COURT: I want to finish this argument, gentlemen, in a very few minutes.

MR. KURRUS: Well, our basic contention is that the matter was noticed for hearing.

THE COURT: Please don't repeat. You have said that before. If you have anything new, I will be glad to hear you, but you don't flatter the Court by repeating an argument. The Court then thinks that you doubt whether the Court understood you.

I think I get your point, Mr. Kurrus.

MR. KURRUS: I would like to add this, and this

I believe is new and you can stop me if you have heard this: in every application that has been filed for subsidy before the Maritime Subsidy Board, as far as I know, the applicant has almost always had different vessels at the time it was eventually subsidized than when it originally filed for subsidy, and there has never been a requirement that the fact that it had new vessels by the time it was subsidized necessitated a new hearing.

THE COURT: I will hear the other side. I think you have covered your points.

MR. KURRUS: Thank you.

MR. MASON: In the nature of rebuttal, I have but one point, Your Honor --

THE COURT: Mr. Mason, Mr. Colby's point is that no hearing was necessary under his construction of the statute because this was not an additional service. Now how do you meet that? That is the crux of the case. You have been talking around the crux, but let's get to the crux.

MR. MASON: That is precisely the point that I get to.

Mr. Colby tells you that the Maritime Subsidy Board administratively determined that the service for

which subsidy was awarded was the same as the existing service, but --

THE COURT: No, that isn't what he said. He said it was not an additional service.

MR. MASON: Very well.

THE COURT: Which is different.

MR. MASON: In point of fact, on the face of the order the existing service was limited to a maximum of 18 sailings per year. The subsidy award was for a maximum of 26 sailings per year. That is an increase in service of eight sailings or approximately 50 percent.

Now if the Maritime Subsidy Board did as Mr. Colby says they did, i.e., found that a service increased by 50 percent was not an increase in the existing service, then that is a capricious order and on those grounds we should be remanded to the Board for hearing because if it is an increase and it is an increase from 18 to 26 sailings, even on Mr. Colby's interpretation of the statute a hearing is required.

As to the rest of it, sir, there are more things that I could say but they are in the papers and I would just as soon have you see them directly.

THE COURT: Mr. Colby, what is your answer to Mr. Mason's contention that the increase in the number of sailings is additional service? It seems to me there is some merit in that point.

MR. COLBY: This provision, like the grandfather clauses in the Motor Carrier and Inland Waterway statutes, has quite a practical history and it has always been given the interpretation that the right was dependent upon a bona fide substantial existing service. As long as there is not an additional service in the sense that something entirely different --

THE COURT: You mean additional number of sailings is not construed as additional service?

MR. COLBY: Is not construed as an additional service.

Larger vessels is not construed as an additional service.

The Maritime Administration branches itself have held, in published hearings on this point, to that effect on a number of occasions and they have never been taken before the courts.

THE COURT: Very well, you have answered my

question. In other words, the Government's contention is that an increase in the number of sailings is not additional service.

MR. COLBY: That is right. It has to be a very substantial change.

THE COURT: Is that the administrative construction?

MR. COLBY: I think it is, in the light of these decisions.

THE COURT: Now, gentlemen, among the numerous papers that have been handed me I don't see the complaint. May I have a copy of the complaint?

I want to go over the papers tonight and if you will be here tomorrow morning I will announce my decision.

MR. MASON: All right, sir.

May I assume to leave with you a number of cases in which the Subsidy Board has heard on existing service and undue prejudice?

THE COURT: Yes; any material you would like to submit, you may do so.

MR. KURRUS: Your Honor, could I say one thing? I am sorry to add this, but we are the person that has the

most to lose, even though we are intervenor, and I just don't agree that the crux of this case is whether or not a hearing is required on the question of existing service because, unfortunately, that isn't the way the Board held. The Board's decisions are absolutely contrary to that.

I would like to agree with Mr. Colby --

THE COURT: What do you consider is the crux of the case?

MR. KURRUS: I consider the crux of the case whether or not the Board was required to grant a new hearing to --

THE COURT: Well, that is the same thing putting it in different language.

MR. KURRUS: No, it is altogether different because the Board never found that we had an existing service. They never made that finding at all.

Attachment No. 31, which is the Board's opinion, they specifically state the service is inadequate and they do not make any finding about existing service at all. And the Board's decisions are absolutely contrary to the position that you can --

THE COURT: What decisions?

MR. KURRUS: The administrative decisions of the Maritime Subsidy Board and its predecessor agencies are consistent that a hearing has to be held to determine whether or not a service is existing.

I think Mr. Colby's construction of the statute is an allowable interpretation, but, unfortunately, the administrative decisions are unanimously to the contrary.

THE COURT: Mr. Kurrus, I thought you were trying to uphold the decision of the Board.

MR. KURRUS: I am, but I want to see it upheld on proper grounds and I don't believe --

THE COURT: On what ground do you seek to have it upheld?

MR. KURRUS: I seek to have it upheld on the ground that the application was published in the Federal Register, that any interested party was given an opportunity to intervene --

THE COURT: But not the application as to these two ships.

MR. KURRUS: The fact is, Your Honor, that the statute permits people to replace ships, and on this very trade route United States Lines has just replaced six

break-bulk ships, so to speak, with six container ships and nobody has raised a question, including Sea-Land. And this is done -- as the changing technology of ships, when you put a new ship into a trade it always is more productive than the ship that it replaces, and if you had to have a new Section 605(c) hearing any time that you replaced a ship this Maritime Act would come to a standstill.

THE COURT: You know, here you are trying to support the Government's position and at the same time trying to fight it. That is not much help.

MR. KURRUS: I want to analyze the thing in a proper way, Your Honor, and I believe --

THE COURT: I asked for a copy of the complaint. Is there one? Thank you.

Now, gentlemen, as I said, if you will be here tomorrow morning at 10 o'clock I will have my decision.

(At 3:05 p.m. the hearing stood in recess, to reconvene 10:00 a.m., April 11, 1968.)

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SEA-LAND SERVICE, INC., Plaintiff, v. JOHN T. CONNOR, et al., Defendants.	Civil Action 2614-65

Washington, D. C.

April 11, 1968.

The above cause came on for further hearing of motions before THE HONORABLE ALEXANDER HOLTZOFF, United States District Judge.

Appearances:

For the Plaintiff:

JOHN MASON, ESQ.,
EDWARD M. SHEA, ESQ.

For the Government Defendants:

LEAVENWORTH COLBY, ESQ.
Attorney, Dept. of Justice

For the Intervenor-Defendant:

RICHARD W. KURRUS, ESQ.

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P R O C E E D I N G S

THE DEPUTY CLERK: Sea-Land Service, Inc. v. John T. Connor individually and as Secretary of Commerce, and others, Civil Action 2614-65.

THE COURT: Mr. Colby, there is a question the Court desires to ask you.

On reading the opinion of the Board -- is it the Board, is that its official title, or is it Administration?

MR. COLBY: Well, this point that is being litigated here is by the Maritime Subsidy Board, which is --

THE COURT: What is the name of the agency?

MR. COLBY: The name of the agency is Maritime Administration. It has a Maritime Subsidy Board.

THE COURT: Yes, I understand, but that is a subordinate body within the Administration.

MR. COLBY: Yes, sir.

THE COURT: Now on reading the opinion of the Administration I gathered that the reason they concluded no notice of hearing was necessary was because they gave a hearing on the earlier application and that the second application was, in a sense and in spirit, a continuation

of the proceeding; is that correct?

MR. COLBY: That is correct.

The other is, so to speak, rationale.

Their legal thinking, I find it in the Board's previous briefs in the cases --

THE COURT: In other words, the point that the Government is raising now is not the same point on which the Maritime Administration decided this matter, is that correct?

MR. COLBY: I think it is.

THE COURT: Perhaps I misunderstood your point. As I understand your point, it is that notice and hearing are necessary only if the service to be subsidized would be in addition to existing service.

MR. COLBY: That is right.

THE COURT: But that is not the point that they mentioned.

MR. COLBY: I think that they do, if Your Honor please, in the various statements they make in this opinion denying the Sea-Land intervention. Now they don't spell it out at length but --

THE COURT: No, they don't spell out your point.

They spell out the other point.

MR. COLBY: They spell out the other point because I think they regarded that as much more equitable.

THE COURT: Do you rest on both points?

MR. COLBY: We rest on both points, yes, sir.

THE COURT: Very well, that is what I want to know.

Did you wish to be heard any further?

MR. MASON: I have three short points I would like to make, Your Honor, if I may.

THE COURT: Yes, I will be glad to hear you.

MR. MASON: The first is that the application of February 1964, which is the only application that was noticed for hearing, was in fact denied by the Maritime Subsidy Board.

Now the immediacy of this is that if the noticed application was denied, what is left is the later application, the application of April 1965, on which an award of subsidy was made for some 26 sailings, whereas the existing service was of only 18 sailings.

So that without regard to the other relevant differences, solely on the matter of sailings alone --

THE COURT: What point are you trying to make? What is your point?

MR. MASON: The point precisely is that on the subsidy award that was granted we were entitled to notice and hearing and we did not --

THE COURT: You have argued that, of course.

MR. MASON: Yes.

The second point I would like to call to your attention is that the Maritime Administrator, in formal compliance with the statutory requirement, found and determined that the service in which the two container ships is to be operated was a new service. Now our point is that it being a new service, it was not the existing service, was in addition to the existing service, and on those grounds, too, we were entitled to hearing and notice, which we did not have.

The third point goes to the challenge of our standing. Would you like to hear from me on that? The Act provides two standards for standing. The first part --

THE COURT: What is your point there? Always start with the conclusion so I can follow your argument.

MR. MASON: My point is, we have standing,

obviously, not only before the Board but here.

THE COURT: There is a question raised that was not argued yesterday, but I notice the opinion of the Board raises a question as to your standing to sue.

MR. MASON: That is correct, and that is what I am addressing myself to at this time.

The statute in terms provides that no contract will be made except following hearing of all parties. This is the first part of the section.

THE COURT: Will you tell me briefly, first, and then you can expand it, why you claim youhave a standing to sue.

MR. MASON: Yes. At the time the contract was made Sea-Land Service --

THE COURT: Which contract?

MR. MASON: The contract for subsidy which was made in June, I think, 1966.

THE COURT: Do you mean the contract with your client or the contract with Isbrandtsen?

MR. MASON: There is no contract of any sort between the Government and our client. I mean the contract for the payment of subsidy.

THE COURT: To whom?

MR. MASON: To Export Lines.

THE COURT: Yes.

MR. MASON: At the time that contract was signed, which was in June of 1966, our company, Sea-Land, had been in active operation in that trade for some three months. They started their service in March of that year. They were in service, in actual operation three months before the contract between the Government and Export was signed. They were in operation some six months before performance under that contract was commenced.

Thank you.

/ OPINION OF THE COURT

THE COURT: This is an action to set aside a grant by the Maritime Administration of a subsidy under the Merchant Marine Act of 1936 to an applicant known as the Isbrandtsen Lines, using the short title. The action is brought by a competing steamship line.

The matter is before this Court on the plaintiff's motion for summary judgment.

It is claimed in behalf of the plaintiff that the decision of the Maritime Administration was rendered in

violation of law in that there was no hearing or notice of hearing as required by the pertinent statute.

Naturally, it is hardly necessary to observe that the authority of this Court to review the administrative action is limited to the question whether it transcended the legal powers of the administrative agency or whether it violated any rule of law. The merits are not open for review so long as there is a rational basis for the action of the administrative agency.

The pertinent statute, 46 United States Code 1175, Sub-section (c), provides as follows:

> "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Federal Maritime Board shall determine after proper hearing of all parties that the service already provided by vessels of United States Registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Chapter additional vessels shall be operated thereon."

It will be observed that hearings are not required in all cases of contracts for subsidies but only in those cases in which the service to be subsidized would be in addition to existing service.

The Government contends that the service sought to be subsidized was not in addition to existing service and, therefore, no hearing is required.

On the basis of the findings of the Maritime Administration the Court concludes that the contention of the Government is well founded and that, therefore, no hearing was required. However, it is not necessary to rely solely on this conclusion or on this reasoning because the Maritime Administration pointed out, in its opinion, in some degree of detail, that originally the applicant for subsidy had filed an application for such relief and that the required notice of hearing was given and an opportunity to all concerned to be heard was extended. Later the applicant, whose application related to two ships whose names were specified, filed a new application, which may be, in a sense, regarded as an amended application, substituting two other ships for the two named in the original application.

The Maritime Administration came to the conclusion that since notice of hearing was given as to the original application, no such procedure was required in reference to the new application, the effect of which was merely to substitute two other ships for those originally named.

In a sense, the Maritime Administration took the position that the new application was practically an amendment of the old and, therefore, no new hearing need be noticed. The Court is of the opinion that that was a reasonable view and is in full accord with it. In any event, it was within the discretion of the Maritime Administration to so construe the application.

In view of these considerations the attack on the legality of the proceeding fails.

The Court might add that there is some question as to the standing of the plaintiff to bring this action but the Court, in view of the disposition already made, will not pass upon this question.

Accordingly, the plaintiff's motion for summary judgment is denied.

Counsel may submit an appropriate order.

- - -

[Caption Omitted in Printing]

FILED

APR 15 1968

ROBERT M. STEARNS, Clerk

FINAL ORDER

This action came on to be heard ~~before the Court, Honorable Alexander Holtzoff, District Judge presiding,~~ on the motion of the plaintiff ~~above named having regularly moved pursuant to Rule 56~~ for summary judgment ~~for the relief demanded in the complaint upon the basis of the complaint and the answers thereto of defendants~~ and intervenor-defendant American Export Isbrandtsen Lines, Inc., together with defendants' admissions under Rule 36 ~~and the affidavit of Michael R. McEvoy, plaintiff's president~~, and defendants ~~above named~~ having demanded judgment dismissing the action, ~~both~~ in their answer to the complaint and in their statement in opposition to plaintiff's motion, and counsel for all parties having in open court stipulated ~~and agreed~~ that there is no genuine disputed issue as to any material fact, and the court having delivered an oral opinion

~~Now, on considering the foregoing and after hearing and considering the arguments and memoranda of all counsel, and upon the oral opinion of the Court herein,~~ it is ~~hereby~~ this 15th day of April 1968

ORDERED that plaintiff's motion for summary judgment be and the same hereby is in all respects denied, and it is further

ORDERED that defendants' demand for judgment dismissing the action be and the same hereby is granted, and it is further

ORDERED, ADJUDGED and DECREED that the action be dismissed on the merits and that defendants recover of plaintiff their costs of action.

~~DATED at Washington, D. C., this~~ _____ ~~day of April,~~ 1968.

Alexander Holtzoff
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

Leonard Kerry
Attorney for Defendants

NO OBJECTION TO FORM:

John Mason
Attorney for Plaintiff

James P. Gambrill
Attorney for Intervenors

NOTICE OF APPEAL

Notice is hereby given this 11th day of June, 19 68, that Sea-Land Service, Inc., Plaintiff

hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15th day of April, 19 68 in favor of John T. Connor, et al., defendants against said plaintiff.

Attorney for

Sea-Land Service, Inc.

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BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 22140

SEA-LAND SERVICE, INC.

Appellant

v.

JOHN T. CONNOR, et al.

Appellees

APPEAL FROM FINAL ORDER OF THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

John Mason
Edward M. Shea
900 - 17th Street, N.W.
Washington, D. C. 20006
Attorneys for Appellant

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in holding that no notice and hearing was necessary under Section 605(c) of the Merchant Marine Act, 1936 (46 USCA §1175) in that the service sought to be subsidized was not in addition to existing service?

II. If the District Court's construction of said Section 605(c) is correct, did the application of that provision under the circumstances here effectively deprive appellant of procedural due process of law?

III. Did the District Court and appellee Maritime Subsidy Board err in holding that appellee American Export Isbrandtsen Lines, Inc.'s application of April 7, 1965, was an amendment to its noticed application of February 24, 1964, the noticing of the latter thus satisfying the notice requirements with respect to the former?

IV. Did appellant have standing to bring this action in the District Court?

This case has not previously been before this Court.

STATEMENT OF THE CASE

This is an appeal from a Final Order of the Honorable Alexander Holtzoff (JA 114) denying appellant's Motion for Summary Judgment and dismissing appellant's Complaint.

Appellant's Motion for Summary Judgment came on for hearing before Judge Holtzoff on April 10, 11, 1968; and, after argument by counsel, the District Court held for appellees (JA 110).

The Complaint (JA 22) sought an injunction against appellees John T. Connor, Secretary of Commerce, and the Maritime Administration/Maritime Subsidy Board ("MA/MSB") enjoining them from entering into and/or consummating an operating-differential subsidy contract under Title VI of the Merchant Marine Act of 1936 (46 USCA §1171 et seq.) (the "Act") with American Export Isbrandtsen Lines, Inc., ("AEIL"). AEIL intervened as a defendant in the case below (JA 30) and is an appellee in this proceeding.

SUMMARY OF FACTS

1. Section 605(c) provides in substance that no operating-differential subsidy contract shall be entered into on a route served by other American-flag lines unless the MA/MSB makes certain findings.

2. That Section further provides for a "proper hearing of all parties" where the application involves subsidy of additional service, and provides for a "public hearing" where the application involves subsidy of an existing service.

3. AEIL filed a document which was either an application for operating-differential subsidy of an amendment to an earlier application which encompassed substantial amendments to the earlier application; so substantial, in fact, that the MA/MSB in a press release characterized some of the amendatory aspects as "a proposal to Pioneer" and "original and enterprising" which would "have approximately double the capacity of the 2 conventional ships now in service."

4. There were indeed other American-flag lines operating on that route before, at the time of, and since AEIL filed the document referred to just above.

5. No notice was ever given, or hearing ever held, with respect to AEIL's said filing by the MA/MSB; rather, the MA/MSB administratively processed it, approved it, denied Appellant's request to reopen the matter after learning of approval of it, and entered into an operating-differential subsidy contract based upon it.

6. Since the entry into said contract between MA/MSB and AEIL, AEIL and Appellant have been operating in head-to-head competition on the relevant trade route with AEIL's service subsidized by the Government of the United States, and with Appellant's service receiving no such subsidy.

NARRATIVE OF FACTS

Appellant [1] is a common carrier by water in both the domestic and foreign commerce of the United States. Appellant is a non-subsidized operator; i.e., appellant receives no Federal subvention under Titles V and VI of the Act. Appellant operates, inter alia, a fully containerized service between the North Atlantic coast of the United States and Northern Europe on a weekly basis. Appellant has operated this container service since March of 1966.

Containerships differ substantially in physical construction from break-bulk vessels. Common carrier by water service provided by containerships is a relatively new and important development in domestic and foreign commerce. A container service differs from that provided by a traditional break-bulk vessel service in that an integrated service is provided; the container being placed at the shipper's plant where the cargo is loaded into the trailer by the shipper, the trailer then transported intact to the ultimate destination, where it is unloaded by the

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1/ The Statement of Facts which follow are taken from Plaintiff's Statement of Material Facts (JA 36). The District Court specifically found this Statement of Material Facts to be controlling (JA 86) and indicated there was no dispute re any material fact (JA 110).

consignee. Substantial cost advantages are realized in comparison with traditional break-bulk ships, in that it is the trailer itself which is loaded onto the containership for the ocean passage. There are, however, some commodities that are not suitable for containerization, and, as such, must move on break-bulk vessels. Containerization substantially reduces cargo delivery time and vessel turnaround time in comparison to break-bulk ship operations. In sum, a container service generally has a competitive advantage over a break-bulk service. This court has taken note of the difference between a conventional break-bulk service and a container service, and some of the advantages of the latter over the former. City of Los Angeles v. Federal Maritime Commission, 128 U.S. App. D.C. ____ , 385 F.2d 678 (1967).

Appellee AEIL is a common carrier by water in the foreign commerce of the United States. AEIL is a subsidized operator; i.e., AEIL receives operating-differential subsidy under Title VI of the Act.

The Maritime Administration and the Maritime Subsidy Board (MA/MSB), are the governmental agencies charged generally

with the administration of the provisions of the Act, and specifically with the requirements of Section 605(c) of the Act; 46 USCA §1175(c).

On February 24, 1964, AEIL made application for an operating-differential subsidy contract on Essential Trade Route 5-7-8-9 (which includes United States North Atlantic ports and ports in Western Europe), with the MA/MSB. That application was duly noticed in the Federal Register of April 1, 1964, as required by 46 CFR 201.72, for public hearing pursuant to Section 605(c) of the Act. That notice specifically described a subsidized freight service utilizing two war built break-bulk cargo vessels then operating on that route on a nonsubsidized basis as a result of an earlier authorization by the MA/MSB. There being no opposition, [2/] defendant MA/MSB made the requisite findings under Section 605(c) without hearing. Ultimately, the MA/MSB denied, by letter of August 12, 1965, AEIL's said application, and AEIL accepted that denial.

2/ United States Lines Company, an important U.S.-flag carrier on that route had previously entered into an agreement with AEIL not to oppose AEIL's application if AEIL would withdraw its opposition to a pending application of U.S. Lines Company before the MA/MSB.

Meanwhile, on April 7, 1965, while the application of February 24, 1964, was still pending before the MA/MSB, AEIL filed a second application on behalf of Container Marine Line, Inc., a subsidiary to be formed. This second application was for construction-differential subsidy in the conversion of two ore carriers to containerships and for operating-differential subsidy in the operation of the converted containerships on the aforementioned trade route. A graphic representation of the differences between these two applications in the context of the provisions of Section 605(c) of the Act follows.

COMPARISON OF THE TWO APPLICATIONS IN THE CONTEXT OF SECTION 605(c) STANDARDS

Application of 2-24-64	Application of 4-7-65	Section 605(c) of the Act
I. Contract Matters	I. Contract Matters	I. Contract Matters
. To amend an existing operating-differential subsidy (ODS) contract	. New, independent ODS contract	. No ODS contract where U.S.-flag competition exists unless proper findings after public hearing
. Same party, AEIL	. New corporation as party; Container Marine Lines, Inc.	
. ODS amendment application only	. Combination construction-differential subsidy and ODS application	
. Subject matter two existing non-subsidized vessels then owned and operated by the applicant on the trade route	. Subject matter two vessels to be converted under porposed construction-differential subsidy contract; not then owned, not then operated by the applicant on the trade route	
II. Vessel and Service Matters	II. Vessel and Service Matters	II. Vessel and Service Matters
		. In determining competitiveness, following be considered:
. Vessel type - bulk cargo	. Vessel type - containerships	. Vessel type
. Vessel size - smaller; 10.7 and 9.1 dwt	. Vessel size - larger; 16.5 dwt	. Vessel size
. Vessel speed - slower; 15.5 and 14.0 kns	. Vessel speed - faster; 16.5 kns	. Vessel speed
. Ports and ranges - Continental Europe required; England, Iceland, and Spain privilege	. Ports and ranges - Continental Europe required; no privilege areas requested	. Ports and ranges
. Cargo character - general, some actually carried non-containerizable	. Cargo character - exclusively containers	. Cargo character
. Voyage number - 15 to 26	. Voyage number - 18 to 26	

At no time did the MA/MSB publish notice or hold a hearing pursuant to Section 605(c) in respect to this second application, or in respect to any amendment of the first application. Instead, the MA/MSB concluded, ex parte, that the Section 605(c) findings relating to the first application for the subsidy of the operating break-bulk vessels met the notice and hearing requirements in respect to the second application.

By press release dated August 19, 1965, the then Maritime Administrator and Chairman of the Maritime Subsidy Board announced approval by those agencies of AEIL's application of April 7, 1965. On September 1, 1965, Appellant petitioned those agencies to reopen and reconsider their approval thereof. On September 10, 1965, those agencies served their opinion and order denying Appellant's petition and issued a supplemental opinion on September 30, 1965.

Thereafter, Appellant filed on September 20, 1965, a petition with appellee, Secretary of Commerce, requesting that he review the decisions of the MA/MSB. On October 4, 1965, said Secretary of Commerce entered an order denying Appellant's said petition for Secretarial review.

On June 30, 1966, AEIL and the MA/MSB entered into an operating-differential subsidy contract for the operation of the said containerships on the said trade route. Since October 17, 1966, AEIL has been and is operating in direct competition with Sea-Land on the said trade route, causing direct and continuing economic injury to Sea-Land. This results from the fact that AEIL's operations are contributed to by the payment of subsidy to AEIL by the MA/MSB.

ARGUMENT

I. The District Court generally erred in holding that no notice and hearing was necessary under Section 605(c) of the Act; and specifically erred in basing that holding on the premise that the service sought to be subsidized was not in addition to existing service.

The key issue in this proceeding is the statutory construction of Section 605(c), which, as counsel for the Government Appellees pointed out:

> "This point is res integra; it has never been decided yet. This is the first case in which it has come up for ligigation." (JA 70)

In opposing Appellant's motion for summary judgment, the Government Appellees for the first time in the thirty year history of Section 605(c) of the Act, argued that the "right" to a hearing under that Section is not a right at all; but a contigency which depends upon threshold findings by the MSB:

"MR. COLBY: The conclusion of the argument is that this provision of the statute does not require the holding of a hearing if the Administration finds ex parte certain facts which they found in this case.

"THE COURT: I see. Very well.

"MR. COLBY: Those are described in Subsection (c):

'No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services . . .'

"And those are the magic words.

'. . . unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act' --

"THE COURT: Yes, I have it before me. I have the Code before me.

"MR. COLBY: All right.

"Now, you see, what the administrative agency has done is to find that the service in this case was not an additional service.

> "In other words, American Export Isbrandtsen, the party to whom the subsidy was made, was already operating an existing service. The Administration found that they were operating such an existing service and, therefore, found that they didn't have to have a hearing and didn't have to notice a hearing." (JA 67, 68)3/

The Court below, while it had some reservations about making the right to a hearing hinge on the ex parte determination of the hearers themselves;

> "THE COURT: In other words, the Board determines the very fact whether a hearing is necessary.
>
> "MR. COLBY: That is right.
>
> "THE COURT: That seems rather extraordinary, doesn't it?" (JA 69)

upheld this construction of the statute.

3/ This does not explain away the duty to hold a "public hearing" found in the second clause of Section 605(c) where they would involve "a vessel operated or to be operated." However, Counsel for the Government Appellees implied (JA 89) that a logical extention of his theory would be that the MA/MSB could make administrative findings that the effect of the contract would not be "to give undue advantage or be unduly prejudicial" to American-flag competitors, thus obviating the need to hold a hearing under those circumstances as well.

Appellant respectfully suggests that the Court below erred in so holding for several reasons.

First, the MA/MSB has consistently noticed operating-differential subsidy applications--and held hearings thereon when appropriately protested by an American-flag competitor--without distinction as to whether the applications involved the subsidizing of an existing service or an additional service.

Recognition has been made that it is MA/MSB's statutory duty to do so, since a right of competitors is involved.

In Waterman S. S. Corp. - Subsidy, Route 21 Etc., 5 FMB 771 (1960) that company had applied for operating-differential subsidy on serveral trade routes. After the application was noticed, and several American-flag companies operating on those routes duly intervened, hearings were held and evidence taken on, inter alia, the factual question of whether Waterman's application involved existing or additional service on the given trade routes at issue. After hearing, a recommended decision was made by an examiner, exceptions and replies thereto were filed, and the MA/MSB's predecessor entered its report. There it was said:

> "This report is limited to the application for operating-differential subsidy as it relates to section 605(c) of the Act. If the proposed service is not an 'existing' one within the meaning of that section, we must determine under the first part that the existing service by United States-flag vessels is inadequate, in order to enter into a subsidy contract. If, however, the proposed service is an 'existing' one, then the second part of the section is controlling, and a finding of inadequacy of United States-flag service is not a requirement unless we find that the effect of awarding a subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States." (Footnote Omitted) (Id. at 777)

Thereafter, the MA/MSB discussed the evidence of record, and made findings based on that evidence as to whether, to what nature, and to what extent, Waterman had an existing service:

> "We find that applicant had an existing service, within the meaning of section 605(c), of 20 sailings annually between ports in the east Gulf (including and east of New Orleans) and ports in Germany, Belgium, and the Netherlands, . . ." (Id. at 779)

- - -

> "While Waterman contends that the examiner erred in his conclusion with respect to its existing service on Trade Route No. 21, imsofar as ports in the Gulf west of New Orleans and ports in France are concerned, we believe that such conclusions are supported by the record. Waterman made four calls in 1956 and one in 1957 to but one port in the area; this is not sufficient to justify a finding of existing service. Nor does it appear that the service to France is in reasonable general accord with the type of berth commercial service required of a subsidized operator." (Id. at 778)

Whether preference or prejudice were involved:

> ". . . The record does not support a claim of undue prejudice to Lykes or undue advantage to Waterman." (Id. at 782)

As well as whether existing service was adequate:

> "We find and determine that service on Trade Route No. 21 is inadequate and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon." (Id. at 782)

In sum, the applicant and intervenors in this case were given the opportunity at hearing to develop evidence with respect to not only "adequacy" but also

whether the service was "existing" or "additional," and whether undue prejudice or advantage would result. This case is by no means extraordinary; but typifies the approach of the MA/MSB to Section 605(c) hearings over the years. Rather than bloat this brief with further citations, however, we challenge the Appellees to cite to this Court any instances where the MA/MSB has articulated the position that it had the power to reserve to itself for administrative determination the issues of whether a service was "existing" or "additional," and whether a subsidy grant would result in preference or prejudice.

Second, this newly advanced interpretation of Section 605(c) does not square with basic rules of statutory interpretation. The whole basis of the interpretation is the placement of the clauses relating to hearing after, rather than before, some of the findings which Congress instructed the MA/MSB to make as a prerequisite to entering into a subsidy contract.

We know of no rule of either grammar or of statutory construction that requires a modifying clause to precede rather than follow the matters to which it relates. Under such a construction, the first clause of the Fifth Amendment to the Constitution of the United States to be fully

operative would have to read:

> Unless on a presentation or indictment of a Grand Jury, no person shall be held to answer for a capital, or otherwise infamous crime, except . . .

In construing a statutory provision which includes hearing provisions, it seems fair to say that those provisions will not lightly be found to be a matter of administrative discretion as opposed to a matter of right.

> "In reaching our decision to affirm the Commission, we have not been unmindful of the cardinal importance of the right to be heard where one's interests are acutely affected by the actions of an administrative agency. It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law requires that a hearing be held. This court is certainly in agreement with this principle and recognizes it as one of the essential elements of our form of government."
> National Broadcasting Co. v. F.C.C., 124 U.S.App.D.C. 116, 362 F.2d 946, 953 (1966).

Third, the MA/MSB, in its denial of Appellant's petition to reopen, did not base either its refusal to do so or its rationale for not noticing AEIL's application in the first place on this ground. On the contrary, the MA/MSB said:

> "After further analysis of the situation, the Board concluded that there was no legal requirement for re-publication of AEIL's new application of April 7, 1965, and further concluded that the type of ship to be employed is not an issue under Section 605(c), the issue being inadequacy of present U.S.-flag service and whether or not the addition of American flag vessels would lessen the inadequacy and be in furtherance of the purposes and policy of the Act." (JA 16)
> (Emphasis added)

That issue, of course, is the one where the application relates to subsidy applications for additional, not existing, service. Nowhere in the decision did the MA/MSB even intimate that its failure to give notice and to hear was based on AEIL having an existing service which obviated the right of a competitor to be efforded notice and hearing. It is a basic rule of the administrative law that:

> ". . . the propriety of such action [must be judged] solely by the grounds invoked by the agency." SEC v. Chenery Corp., 332 U.S. 194, 196, 67 S.Ct.1575, 91 L.Ed. 1995.

Fourth, the determination could in no event have been based ipso facto on existing service, since the application contemplated something substantially different, as demonstrated in the graphic presentations at p.9 supra, from what AEIL was then operating on the route. 4/

These differences are precisely the kind of factual matters which have been the subject of extensive evidenciary hearings under Section 605(c) over the years.

> "While permanency of service is an important factor in determining whether a service is in fact 'existing,' there are many other factors. As we said in Pac. Transp. Lines, Inc.--Subsidy, Route 29, 4, F.M.B. 7,11:"
>
> 'The term 'service' embraces much more than vessels; it includes the scope, regularity, and probable permanency of the operation, the route covered, the traffic handled, the support given by the shipping public, and other factors which concern the bona fide character of the operation.'

4/ It is significant that MA/MSB did notice for hearing AEIL's original subsidy application of February 24, 1964, which contemplated subsidy of the two vessels then operating unsubsidized and, as such, almost certainly an existing service. If no notice was necessary for subsidy of existing service, why was this done?

"The evidence in the case is convincing that each one of these factors mentioned in the excerpt was fulfilled by Lykes with additional sailings, at least so far as they served the Far East ports on Trade Route 22 (other than in NEI/Straits area). It follows, and we so find, that the unsubsidized operation of Lykes was, to some extent at least, an "existing service" within the meaning of section 605 (c). . . ."

. . .

"In view of our finding that the additional service herein considered was, to some extent, an "existing" service, and in view of the time which has elapsed since the close of the hearing before the examiner, and the additional evidence on the issues of the case that is now available, we are returning the case to the examiner to permit the parties to offer additional and more recent evidence, and permit the examiner to make a further recommended decision, in the light thereof, as to the <u>extent</u> to which the operator has maintained an "existing service," both as to the number of additional sailings, and as to the geographical limits of the service covered. Upon the entire record the examiner also will be able to make a recommended decision on whether the effect of a

> subsidy contract for additional subsidized sailings would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, as well as upon any other issues arising under section 605 (c) as the amplified record may make appropriate."
> Lykes Bros. S.S. Co., Inc. - Increased Sailings, Route 22, 4 F.M.B. 153, 158, 159 (1953).

For these reasons, it was error for the trial court to hold that no notice and hearing of AEIL's application was necessary due to the statutory provisions of Section 605(c).

II. The construction of Section 605(c) by the Court below would be out of harmony with the requirements of procedural due process of law in that the section would provide a substantive right without a procedural remedy to implement that right.

We realize full well that Congress, in regulating the foreign commerce, has full authority to adjust, on an even handed basis, the competitive balance between subsidized lines such as AEIL and unsubsidized lines such as Appellant. When Congress enacted Section 605(c), it did just that. However, in so providing for circumstances where that competitive balance might be effected, Congress specifically provided that additional service would be subsidized only if the service on the route was then inadequate, and that existing service would be subsidized only if the payment of subsidy would not be unduly advantageous or unduly prejudicial unless the service was inadequate. Thus, Congress continued (created?) the right of the competitor of the subsidy applicant to be free of subsidized competition if the service on the route is adequate in both cases, and the payment of subsidy would be preferential or prejudicial in the latter case.

If, then, the Court below's construction of the statute is correct, there exists a right on the part of Appellant or others similarly situated, but as to which there is no recourse. This state of affairs, we submit, constitutes the denial of due process of law. Under such circumstances, it is submitted that the right to be heard on these issues would be presumed to exist even if Section 605(c) were silent as to a hearing.

> ". . .The Act should, therefore, in order that it may be brought into harmony with the Constitution be construed to contemplate a hearing before decision by the Commission on the issue stated." L. B. Wilson, Inc. v. Federal Communications Comm'n, 83 U.S. App.D.C. 176, 170 F.2d 793, 802 (1948).

Here, however, all that needs to be done to harmonize the Section with procedural due process requirements is to construe the hearing requirement so as to include all of the factors to be determined thereunder; a construction which has been consistently followed by the agency itself over the years.

III. Whether an independent application or amendment to an earlier application, AEIL's filing of April 7, 1965, required notice and hearing under the provisions of Section 605(c).

As an alternative grounds for upholding the action of the Government appellees, the court below held that:

> " . . . . However, it is not necessary to rely solely on this conclusion or on this reasoning because the Maritime Administration pointed out, in its opinion, in some degree of detail, that originally the applicant for subsidy had filed an application for such relief and that the required notice of hearing was given and an opportunity to all concerned to be heard was extended. Later the applicant, whose application related to two ships whose names were specified, filed a new application, which may be, in a sense, regarded as an amended application, substituting two other ships for the two named in the original application.
>
> "The Maritime Administration came to the conclusion that since notice of hearing was given as to the original application, no such procedure was required in reference to the new application, the effect of which was merely to substitute two other ships for those originally named.

> "In a sense, the Maritime Administration took the position that the new application was practically an amendment of the old and, therefore, no new hearing need be noticed. The Court is of the opinion that that was a reasonable view and is in full accord with it. In any event, it was within the discretion of the Maritime Administration to so construe the application." (JA 112, 113)

It appears to us that the document which AEIL filed with the MA/MSB on April 7, 1965, constituted an independent application for operating-differential subsidy. Alternatively, under what we would consider a strained interpretation indeed, that document would be construed as an amendment to the earlier application of February 24, 1964. Under either view, notice of the later filing was required by law. Failure to give such notice, which foreclosed the correlative right to be heard, vitiated the subsequent administrative proceedings and the resulting operating-differential subsidy contract for the reasons next discussed.

AEIL's application of February 24, 1964, was for operating-differential subsidy for the specific break-bulk ships, SS REMSEN HEIGHTS and SIR JOHN FRANKLIN, on Trade Route 5-7-8-9 on routes on which, and at frequencies

at which, these ships had been operating in break-bulk service since 1962, without subsidy. There is and was nothing about that application reasonably calculated to alert Appellant (or anyone) to the fact that, under color of notice of that application, AEIL would be awarded operating-differential subsidy on other and different ships, in another and different service. Not even the representations of the application as to future replacement of these vessels affords a clue to such a possibility; for the application, while setting out in detail AEIL's overall replacement program as to other ships, said merely that:

> "It is contemplated that suitable replacement for the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, the subject of this application, will be agreed upon." (JA 40)

Thus, the application of February 24, 1964, was of little, if any, competitive concern to Appellant as a carrier of cargo in intermodal containers in containerships. On the other hand, the application of April 7, 1965 (whether as an amendment to the earlier application, as AEIL claims, or as a new and different application, as we contend) was of direct and immediate competitive concern to Appellant, for this application (amendment) was for operating-

differential subsidy in the operation of containerships in the carriage of cargo in intermodal containers in direct competition with Sea-Land's like, but unsubsidized, service.

Section 605(c) says that:

> ". . . The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper."

Here, not only was there a substitution of ships of a materially different "type" (cellular containerships, as compared with conventional break-bulk ships); "size" (cargo capacity of 16,500 weight tons and 20,000 measurement tons, compared with approximately 9,000 to 11,000 weight tons and 11,000 measurement tons); "speed" (16.5 knots compared with 14 knots in the case of one vessel, 15.5 knots in the case of the other); and designed to carry a different "character of cargo" (i.e., containerizable cargo in intermodal containers, compared with the greater variety of cargoes, both containerizable and

non-containerizable, carried by break-bulk vessels), but also there was a substitution of a new and different geographic service. See graphic comparison, page 9, supra.

The Maritime Administration is authorized (under Section 601 of the Act) to enter into contracts for financial aid in the operation of ships which are to be used "in an essential service in the foreign commerce of the United States." Neither at the time of the application of February 24, 1964, nor at the time of the application of April 7, 1965, was there a determination that a container service maintained with container vessels was essential to that foreign commerce. It was not until August 12, 1965, concurrently with the award of subsidy to AEIL, that such a determination was made under Section 211 of the Act. Thus the application of April 7, 1965, related to a service, as well as ships, that were materially different from the service and ships involved in the application of April 7, 1965, and clearly, whether as a new application, or an amendment to the pending application, raised issues which Section 605(c) requires be determined only after notice and hearing.

We think that, as a legal matter, the application of April 7, 1965, was a new application for the following reasons.

"A communicated rejection of an offer causes it to become a nullity." 1 Corbin on Contracts, §94 (1963); Tradeways Incorporated v. Chrysler Corporation, 2d Cir. 1965, 342 F.2d 350, 354.

The MA/MSB specifically and articulately stated in its letter of August 16, 1965, that the Board denied AEIL's application of February 24, 1964. That this is a correct statement of facts was not only admitted by the Appellees, but also their contemporaneous correspondence treated the documents filed on April 7, 1965, as a new and independent application. We are unaware of any way by which a rejected offer, being a legal nullity, can be amended.

Finally, the MA/MSB, in its decision (JA 8), denying Appellant's Petition to Reopen, stated:

> "The facts are that on April 7, 1965, American Export Isbrandtsen Lines, Inc. filed an application for operating and construction differential subsidy on the conversion of two ore carriers, MC Design C5-S-AX1, to two containerships, MA Design C5-S-77a, for operation on Trade Route 5-7-8-9 as replacements for two cargo vessels (SSs REMSEN HEIGHTS, an AP2 type, and SIR JOHN FRANKLIN, a C-1 type) currently operating without subsidy on that Trade Route (U.S. North Atlantic/United Kingdom and Continent)."

Viewed objectively, as it must be,[5/] the parties did not intend the April 7, 1965, filings to be amendatory to the application of February 24, 1964.

But even if the filing of April 7, 1965, were construed as an amendment or change to the application of February 24, 1964, notice and hearing were still required. 5USCA §554 requires that persons entitled to notice shall be timely informed of the nature thereof and the matters of fact asserted. 46 CFR Section 201.72 requires that Federal Register publication be in sufficient detail to apprise interested persons of the nature of the issues to be heard. Both of these notice provisions have been construed as requiring republication where a substantive change is made subsequent to the original notice.

With respect to the former, see American Trucking Ass'n v. Frisco Transp. Co., 358 U.S. 133, 3 L.Ed.2d 172, 79 S.Ct. 170, where it was said, at 143:

5/ Societe Cotonniere Du Tonkin v. United States, Ct.Cl. 1959, 171 F.Supp. 951: Orient Mid-East Great Lakes Serv. v. International Export L., 4 Cir. 1963, 315 F.2d 519.

> "This factor militates strongly in favor of the Commission's conclusion that the reservations inadvertently were omitted, particularly when it would have been improper for the Commission to change its decision without notice to the protestants who had appeared before the hearing examiner in opposition at the original finance proceedings and had taken exception to at least one of the purchases. 49 USC §5(2)(b); 5 USC §1004."

The MA/MSB themselves have consistently held that no substantial deviation from that which is noticed may occur during subsequent administrative proceedings on the application. See Lykes Bros. Steamship Co., et al. - Subsidy Routes 10, 13, 18, 7 SRR 643, 650 (1966)[6/] where it was stated:

> "(i) the Azores are not expressly part of any one essential trade route. At the present time and under circumstances hereprevailing it is not appropriate, as Counsel for Central Gulf attempts to do, to infer from any action by the Administrator or the Board (including the manner in which its internal statistics are compiled) that the Azores be considered part of any trade route;

6/ Pike and Fischer Shipping Regulation Reports.

"(ii) the application of Central Gulf did not expressly mention the Azores and subsequent submissions by Central Gulf during the course of the public hearing are not sufficient to correct this defect in the application in the absence of express and formal amendment thereof in light of (i) above;

"(iii) the notice the Board issued in this proceeding made no mention of the Azores which is necessary in light of (i) above in order properly to have a matter at issue in public proceedings;

"(iv) the fact of actual notice to Farrell, as given by Counsel to Central Gulf, was not sufficient to remedy the lack of notice in the Board's notice of filing since the purpose of notice is to inform the public generally;

"(v) to make the required findings under Section 605(c), it is necessary to have 'proper' notice, thereby affording an opportunity for hearing to all interested parties and it is also necessary to have facts developed at the hearing on the issues properly under Section 605(c), which Central Gulf did not supply at the instant hearing."

See also, States Marine Corp. - Subsidy, Tricontinent, Etc., Services, 5 FMB 739 (1959) where the MSB's predecessor stated, at page 743:

> "The petitions include prayers for clarification of our disposition of requests on the application for calls at privilege ports. At the outset we find that the application does not include a request for the privilege of moving cargoes from Atlantic or Gulf ports to Canal Zone and Mexican ports. Nor did the notice of hearing in the Federal Register reflect that such service would be in issue. Since neither the application nor the notice included the request for the privilege of moving cargo from Atlantic and Gulf ports <u>to</u> Canal Zone and Mexican ports on westbound tricontinent sailings, the issue was not before us and we cannot, in this proceeding, make the requisite findings under section 605(c), which are antecedent to the entering of a contract providing for such service."

That the nature of the application of April 7, 1965, differed substantially from the one of February 24, 1964, has already been demonstrated. Thus, whether the filing of April 7, 1965, was a new application or an amendment, notice and hearing were required. Since neither was given, the contract must be set aside. In a similar situation involving notice requirements under what now is 5 USCA §554, it was said:

> ". . . It is, however, not our function to prescribe the rule which the Commission should pass and we confine ourselves to the holding that the duty to see that proper service is made was not adequately performed in the instant

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> ". . . It is, however, not our function to prescribe the rule which the Commission should pass and we confine ourselves to the holding that the duty to see that proper service is made was not adequately performed in the instant

case with the result that parties that might be affected by the issuance of the proposed certificate had no notice of the application and that therefore the issuance of the certificate must be restrained." Pinkett v. United States, D. Md. 1952, 105 F.Supp. 67, 72.

IV. Appellant had standing to bring this action in the District Court in that it was a person aggrieved within the meaning of a relevant statute.

While the Government appellees raised the issue of standing in their Answer (JA 29), they have not affirmatively pressed the matter. That is, no motion to dismiss or cross-motion for summary judgment was ever filed by them during the pendency of the action in the District Court. The Court below specifically declined to pass on the question.

> "The Court might add that there is some question as to the standing of the plaintiff to bring this action but the Court, in view of the disposition already made, will not pass upon this question." (JA 113)

However, the need for a final disposition of this matter requires consideration of this question now.

5 USCA §702 defines a person entitled to review as one, inter alia, (1) adversely affected or aggrieved by agency action (2) within the meaning of any relevant statute.

The Court below has specifically held that an unsubsidized carrier in competition with another carrier granted operating-differential subsidy under Section 605(c) of the Merchant Marine Act, 1936, is adversely affected or aggrieved by that grant. American President Lines v. Federal Maritime Board, D.D.C. 1953, 112 F.Supp. 346.

However, under the rule in Kansas City Power and Light Company v. McKay, 93 U.S.App.D.C. 273, 225 F. 2d 924 (1955), Appellant realizes that it must go further and show that the adverse affect of the agency action must arise out of a judicially enforceable right conferred by a relevant statute.

> "While in the light of the decisions of the Supreme Court we would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption, no judicially enforceable right of plaintiffs has been disregarded by the administrative action brought before us for review." (Id, at 933)

Illustratively, Appellant would have grave doubts

over the validity of its standing if we were here contesting the merits of the agency action in awarding a subsidy contract after proper notice and hearing.

But we are not. Appellant asserts that its aggrievement is a direct result of failure by the MA/MSB to afford Appellant specifically, and the public generally, the hearing required by the plain meaning of the relevant statute; Section 605(c). In other words, the agency action that was the nexus to the aggrievement within the meaning of the relevant statute was the unlawful failure to notice and to hear prior to award--not the making of the award which, when lawful procedures are followed, is discretionary.

The soundness of this proposition is borne out by this court's decision in Whitney Nat'l Bank v. Bank of New Orleans & Trust Co., 116 U.S.App.D.C. 205, 323 F.2d 290 (1963), where it stated, at 300:

> ". . . District Judge Youngdahl brushed aside the Comptroller's discretion argument by saying, at page 778:
>
> 'Defendant argues that the approval or disapproval of branches of national banks is a matter clearly committed to the discretion of the Comptroller. But there is no discretion in the Comptroller to approve the establishment of a branch office at a location prohibited by law. * * * In the instant case,

> there is no desire to control the defendant's discretion * * *. But, as mentioned above, there is no discretion to unlawfully issue a certificate. * * *' (Emphasis added.)"

For these reasons, Appellant asserts that it is a person adversely affected or aggrieved by the failure of the MA/MSB to notice and hold hearings on AEIL's operating-differential subsidy application of April 7, 1965. As such, Appellant had standing to seek review of that action by the Court below.

One more factor regarding standing should be noted. Appellant, as such, was not operating on the trade route at issue on April 7, 1965,[7/] the day AEIL filed its second subsidy application. However, Appellant was engaged in pre-inaugural activities for the establishment of a containership service on the relevant trade route as early as September 1, 1964. Appellant commenced its service on this route in March, 1966, some three months prior to the entry into the operating-differential subsidy contract between AEIL and MA/MSB on June 30, 1966, and some six months prior to the commencement of AEIL's operations pursuant to that contract on October 17, 1966.

We submit that, for the following reasons, the fact that Appellant had not physically begun its European service when AEIL filed its application of April 7, 1965, has no bearing on Appellant's standing.

First of all, Section 605(c) by its own terms makes the date of entry into the contract the critical one in terms of the right of hearing.

7/ However, its then affiliate, Waterman Steamship Company, was then operating an unsubsidized service on that route. See JA 13 , where the MA/MSB takes cognizance of the Sea-Land/Waterman relationship.

> "No contract shall be made . . . unless the Commission shall determine after proper hearing of all parties . . ."

The making critical the contract date in Section 605(c) is in contrast to Section 601 of the Act.[8/] There, the MA/MSB is required to make certain other determinations with respect to the utility of the service contemplated by the application and the ability of the applicant to carry the service out. Section 601, which does not require notice and hearing, makes critical the time of the application; not, as in Section 605(c), the time of the contract.

> ". . . No such application shall be approved by the Commission unless it determines that . . ."

Thus, Congress has set up a procedure whereby certain administrative findings are to be made without hearing before the application shall be approved. However, before the contract is made, the Commission is to provide a hearing to all parties for the purpose of making other, further findings.

As noted above, Appellant was an established operator on the route before the contract was made.

8/ 49 Stat. 2001; 46 USC §1171.

Secondly, the MA/MSB articulately cast aside all procedural questions and treated Appellant as a proper party in denying its petition to reopen for reconsideration in its Opinion of September 10, 1965, (JA 7, 20) the basic final order here at issue. This was done in the face of a specific allegation by AEIL, in its reply to Sea-Land's petition, that Sea-Land had no standing because it had never operated on the trade route at issue (JA 7).

This was consistent with the MA/MSB's past practice.

In Grace Line, Inc., et al.--Puerto Rico Service, 1 MA 290 (1963), the MA/MSB stated, at 303:

> "Seatrain intervened in opposition to the applications although it was not then operating in the Puerto Rican trade."

The MA/MSB then went on to describe pre-inaugural activities which Seatrain Lines, Inc., had commenced quite similar to Appellant's pre-inaugural activities here and accepted, without comment, the propriety of Seatrain's intervention.

The measure of the affect of administrative action is, we submit, to be taken by reference to the competitive situation which will result when the agency action becomes final; not, we submit, when an application is filed. To hold otherwise would not only be contrary to the wording of Section 605(c), but also would do violence to the whole line of cases decided under the Ashbacker[9/] doctrine.

In this regard, see Wirtz v. Baldor Electric Company, 119 U.S.App.D.C. 122, 337 F.2d 518 (1964), where it was said, at 533:

> ". . . The fact that some of them may not previously have entered into Government contracts should not affect their standing."

Thirdly, Appellant had standing to intervene by virtue of the fact that its then affiliate, Waterman Steamship Company, was operating an existing service on the relevant trade route at the time AEIL's subsidy application of April 7, 1965, was filed.

9/ Ashbacker Radio Corp. v. Federal Com Comm'n, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108.

Finally, only the provisions of Section 605(c) relating to the subsidizing of existing service relate the hearing provisions to U.S.-flag carriers serving the route. The provisions relating to subvention of additional service speak in terms of a "proper hearing of all parties." Certainly, then, interested persons other than U.S.-flag carriers operating on the route (e.g., shipper associations, port interests, carriers indirectly affected) would at the very least be entitled to show why they should be heard with respect to an application which might entail additional service. Since, however, the application was never noticed, no one, including Appellant, ever had an opportunity to show that they came within the phrase "all parties." Accordingly, Appellant prima facie came within the scope of "all parties" accorded the right to "proper hearing." As such, it follows that Appellant has standing to seek review in the Court below of the denial of that right.

- - -

For all these reasons, Appellant had standing to seek review in the Court below of the agency action at issue.

CONCLUSION

For these reasons, Appellant prays that this Court remand this action to the Court below with instructions to grant Appellant's Motion for Summary Judgment, to set aside the orders of the MA/MSB and the Secretary of Commerce, to restrain further inplementation of the subsidy contract unlawfully entered into, and to order the MA/MSB to hold a hearing on the AEIL application. This is, indeed, the only meaningful relief possible.

> ". . . The only effective way to correct the error is to set aside the grant to WAVZ and to remand the proceeding to the Commission with directions that it conduct a new and full hearing in which Elm City, as well as the applicants and all other parties in interest, shall be permitted to participate, in accordance with the command of §309(b)." Elm City Broadcasting Corporation v. United States, 98 U.S.App.D.C. 314, 235 F.2d 811, 817 (1956).

Respectfully submitted,

John Mason

Edward M. Shea

Edward M. Shea

August 28, 1968

Attorneys for Appellant
Sea-Land Service, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused copies of the foregoing Brief of Appellant, along with copies of the Appendix filed concurrently herewith, to be served on the United States Attorney for the District of Columbia; Levenworth Colby, Esquire, Department of Justice (attorney for the Government Appellees); and Richard Kurrus, Esquire (attorney for Appellee American Export Isbrandtsen Line, Inc.) by having them delivered to their respective offices.

Edward M. Shea

Edward M. Shea

August 28, 1968

ADDENDUM

Section 605(c) of the Merchant Marine Act of 1936 (46 USCA §1175; 49 Stat. 2003) reads as follows:

> "(c) No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing,

due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry. The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper."

BRIEF FOR APPELLEE AMERICAN EXPORT ISBRANDTSEN LINES, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 22140

SEA-LAND SERVICE, INC.
Appellant.

v.

JOHN T. CONNOR, *et al.*
Appellees.

Appeal from Final Order of the
United States District Court
for the District of Columbia

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Appellee American Export Isbrandtsen Lines, Inc. (AEIL) does not basically disagree with the Appellant's Statement of Issues. However, this Appellee believes the primary issue is whether the District Court properly upheld the Maritime Administration in its determination that a hearing had been noticed and granted on Appellee AEIL's application of February 24, 1964 and that its proposal of April 7, 1965 to replace vessels was merely an amendment requiring no further notice or hearing.

COUNTER-STATEMENT OF THE CASE

This is an appeal from a Final Order of the District Court (J.A. 114) denying the motion of appellant Sea-Land Service, Inc. for Summary Judgment and dismissing appellant's complaint.

The case came before the District Court on the complaint of Appellant Sea-Land Service, Inc. ("Sea-Land"), alleging that it had been aggrieved by having been deprived of a hearing by the Maritime Administration involving an application for operating – differential subsidy by Appellee, American Export Isbrandtsen Lines, Inc. ("AEIL"). The Maritime Administration determined that a hearing had been granted on AEIL's application and that the replacement of vessels involved in the application was merely an amendment to the application requiring no further or additional hearing.

The District Court upheld the Maritime Administration and found that the hearing and administrative procedures followed were legal and proper, and that the discretionary authority exercised was reasonable.

COUNTER-STATEMENT OF FACTS

Although there appears to be no essential difference between Sea-Land and AEIL in this case with respect to any material issue of fact, there is a substantial difference which arises because of what we believe to be Sea-Land's distorted interpretation of certain facts. The only point which Sea-Land sought to raise in its Complaint (Injunction) filed on October 20, 1965 was that it had been denied a proper hearing under section 605(c) of the Merchant Marine Act with respect to an application of AEIL for operating-differential subsidy on Essential United States Foreign Trade Route 5-7-8-9 (U.S. North Atlantic/Northern Europe and United Kingdom). In its brief, before this Court, Sea-Land again contends that it was denied a "proper hearing" before the administrative agency. Sea-Land makes no claim that such an additional

hearing would be availing or that Sea-Land would ultimately succeed on the merits. Its claim is based rather on the assertion that a further hearing was technically required.

At the time that AEIL's application was filed on February 24, 1964, Sea-Land and Waterman Steamship Corporation (Waterman) were both wholly-owned subsidiaries of McLean Industries, Inc. (McLean) (J.A. 13). Waterman, which has since been sold by McLean, was operating on Essential Trade Route 5-7-8-9, but its then associate or affiliate Sea-Land was not operating on the route (Appellant's Brief, p. 41).

The relevant facts concerning AEIL's application for operating subsidy on Trade Route 5-7-8-9 are as follows:

(1) AEIL's application for operating-differential subsidy on Essential Trade Route 5-7-8-9 was filed with the Maritime Subsidy Board on February 24, 1964;

(2) Notice of the application was published in the *Federal Register* of April 1, 1964;

(3) McLean, through its then subsidiary Waterman, requested that a hearing be held on the application under section 605(c);

(4) At a prehearing conference on the section 605(c) issues, held on May 21, 1964, the Board's Chief Examiner Pfeiffer read into the record a telegram from Waterman, dated May 18, 1964, stating that its intervention had been withdrawn;

(5) Since no other person had intervened in the proceeding, Chief Examiner Pfeiffer referred the matter back to the Board for further administrative processing, under other sections of the Act (none of which required a public hearing);

(6) No section of the Merchant Marine Act, except section 605(c), required a public hearing on this application, nor has any public hearing ever been held in the discretion of the agency with respect to any application for operating or construction-differential subsidy on any other statutory section (other than under sections 602, 804 and 805(a), which sections are not herein involved).

(7) AEIL pursued the administrative processing of its application diligently before the Board and was advised that the Board considered it in the best interests of the Government to assure prompt replacement of the two war-built vessels with which AEIL had proposed to institute subsidized service, viz., the SSs SIR JOHN FRANKLIN and REMSEN HEIGHTS;

(8) In accordance with its application for operating-differential subsidy, filed on February 24, 1964, AEIL developed a further program for advancing the replacement of the SSs SIR JOHN FRANKLIN and REMSEN HEIGHTS by the institution of a containership service, which program was submitted as an amendment to its application on April 7, 1965 and which also included an application for construction-differential subsidy for the conversion of the container-ships;

(9) No new or other application for operating-differential subsidy was ever filed by AEIL, and all actions by AEIL and the Board were taken under the application filed on February 24, 1964; and

(10) AEIL's application for operating-differential subsidy envisaged and referred to the replacement of the war-built vessels.

There are two basic errors upon which Sea-Land proceeds to develop its entire argument. First, Sea-Land states that AEIL's application of February 24, 1964 was for

> "two war-built cargo vessels then operating on that route [Trade Route 5-7-8-9] on a nonsubsidized basis as a result of an earlier authorization by the MA/MSB." (Appellant's Brief, p. 7).

An application limited to two war-built vessels was never filed by AEIL. If indeed such an application had been filed, it would have been contrary to the statute and to the purpose of the Operating-Differential Subsidy Program set forth in Title VI of the Merchant Marine Act, 46 U.S.C. 1171, *et seq.* An operating-differential subsidy agreement between a liner operator and the Board envisages a long-term operation under which the operator undertakes various contractual obligations including those to operate a regular and reliable service on the route involved, and, most importantly, the obligation to replace its vessels with new modern tonnage of a type found suitable by the Board. When AEIL's application was filed, the two vessels involved, *viz.*, the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, were then almost twenty years of age, and their characteristics as war-built vessels[1] made them clearly inferior to most vessels that were operating on the route. If the Board had allowed them to be subsidized at all, it certainly would only have been for a short-term period until they could have been replaced with larger more productive vessels.

Section 605(b) of the Act, 46 U.S.C. 1175, indeed provides that "no operating-differential subsidy shall be paid for the operation of a vessel" [delivered prior to January 1, 1946, as these vessels were] that is more than twenty years of age except if a special waiver is granted by the Board. Prompt replacement of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN would obviously have been necessary under any circumstances, and the only question was whether the Board would allow these vessels to operate on an interim basis before they were replaced and, if so, for how long.

---

[1]War-built vessels were those that were mostly mass-produced for the war effort and were constructed or contracted for by or for the account of the United States between January 1, 1941 and September 2, 1945. See 50 U.S.C. App. 1736.

Sea-Land's second error involves its contention that AEIL's application of February 24, 1964 was denied by the Board and that AEIL's amendment to that application, filed on April 7, 1965, constituted a new application (Appellant's Brief, pp. 7-9). This is actually the slender and technical reed upon which Sea-Land's entire argument rests. Certainly, the Board and not Sea-Land is the best judge of whether it did, in fact, deny an application. The circumstances of the Board's action, in this respect, are recited in the Opinion of the Maritime Subsidy Board/Maritime Administrator in MSB/MA Docket No. A-19, decided September 9, 1965 (J.A. 5, beginning at J.A. 11 and ending at the middle of J.A. 13).

The fact is clear that the Board never denied AEIL's application for operating-differential subsidy on Trade Route 5-7-8-9, but it did refuse to grant operating-differential subsidy on the SIR JOHN FRANKLIN and REMSEN HEIGHTS on an interim basis, before the converted containerships started service. Apparently Sea-Land concedes that if the Board had granted operating-differential subsidy on the SIR JOHN FRANKLIN and REMSEN HEIGHTS for any period of time, even a *scintilla juris*, AEIL would have been able to replace its then existing subsidized war-built vessels with containerships without a protest from Sea-Land. Whether the existing war-built vessels were replaced before or after an operating-differential subsidy agreement was consummated is certainly a distinction without a difference.

SUMMARY OF ARGUMENT

In substance, Sea-Land is contending that whenever a subsidized operator replaces its existing vessels with newer, larger and more efficient vessels, a new hearing under section 605(c) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1175, must be held. The statute has now been in existence for more than thirty years, and such a construction of its intent has never heretofore been followed or even urged. If, indeed, that were the requirement of the

statute, subsidized lines would be involved continuously in expensive and interminable administrative litigation which would subvert the purpose of the Merchant Marine Act and render the subsidized liner companies more experienced litigants than steamship operators.

ARGUMENT

I. THE STATUTORY SCHEME

Sea-Land conveniently elides over the theory of the operating-differential subsidy program, which is the cornerstone of the United States Maritime Policy embodied in Title VI of the Merchant Marine Act. Applications for operating-differential subsidy may be filed, under section 601 of the Act, 46 U.S.C. 1171, by any citizen of the United States for the operation of liner vessels on any service declared to be essential to the foreign commerce of the United States. The Maritime Administrator[2] under section 211 of the Act, 46 U.S.C. 1121, establishes various trade service routes and lines that are considered essential.

Public hearings are necessary on such applications to hear protestants only under section 605(c), 46 U.S.C. 1175(c), or in some cases under section 602, 46 U.S.C. 1172, or section 805(a), 46 U.S.C. 1223(a). The latter two sections were not involved in the instant application. A hearing is required under section 605(c) only if there is a timely intervention from a person with standing. See *American Pres. Lines, Ltd. – Atlantic Straits Service*, 1 MA 143, 2 SRR 633 (1963) where the Board re-examined the intent and purpose of section 605(c) hearings and re-affirmed the prior administrative decisions thereunder. A detailed analysis of the legislative history of section 605(c) is appended to that opinion.

A hearing under section 605(c) is not analogous to a hearing for a certificate for public convenience and necessity such as under The Interstate Commerce Act or The Civil Aeronautics Act.

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[2]Functions under section 211 of the Act have been delegated to the Maritime Administrator by the Secretary of Commerce.

The following issues are involved under section 605(c):

(1) Whether the application is one with respect to a vessel to be operated on a service, route or line served by citizens of the United States which would be in addition to the existing service, or services, and if so, whether the service already provided by vessels of U. S. registry in such service, route or line is inadequate, and

(2) Whether in the accomplishment of the purpose and policy of the Act, additional vessels should be operated thereon.

Where the application covers existing service rather than additional service, the issue becomes:

(3) Whether the effect of a subsidy contract would be to give undue advantage or be unduly prejudicial as between citizens of the United States; and if so, whether it would be necessary to grant the contract to provide adequate service by vessels of U. S. registry.

II. REASON FOR OPERATING DIFFERENTIAL SUBSIDY

Operating-differential subsidy is granted to qualified America-flag liner operators who contractually agree to provide, *inter alia*, minimum liner sailings on specified essential services, routes or lines. The subsidy is designed to equalize the costs between the high-cost American-flag liner operator and the average costs of his foreign-flag competitors. It is the purpose of the Act to assure that adequate long-range American-flag service will be provided on each of the services, routes or lines declared to be essential to our foreign commerce.

The basic purpose to be achieved by this program is stated in Title I – Declaration of Policy of the Merchant Marine Act (section 101, 46 U.S.C. 1101) as follows:

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

III. SUBSIDIZED OPERATORS MUST ASSUME SPECIFIC CONTRACTUAL OBLIGATIONS

Each liner operator receiving operating-differential subsidy must enter into a formal Operating-Differential Subsidy Agreement with the Board. Among the obligations that the subsidized operator assumes are the following:

1. The obligation to make a stated minimum number of sailings on each of the services which it operates;

2. The obligation to purchase equipment, supplies and stores and to perform repairs in the United States;

3. The obligation to observe the net worth and working capital requirements of the Board;

4. The restriction against having an interest in any foreign-flag steamship operations or in any operations involved in the domestic commerce of the United States (see sections 804 and 805(a) of the Act, 46 U.S.C. 1222, 1223);

5. The obligation to deposit in capital reserve funds for vessel replacement an amount equal to the annual depreciation on its vessels together with additional deposits for eventual vessel replacement in special reserve funds;

6. The obligation to enter into closing agreements with the Department of Treasury relating to the Capital and Special Reserve Funds;

7. The obligation to commit itself to a specific ship replacement program; and

8. The obligation to subject itself generally to the surveillance of the Maritime Subsidy Board and Maritime Administration and to observe the various regulations published by those agencies.

A subsidized operator in return for the operating-differential subsidy which it receives must relinquish a good deal of its operating flexibility. For this reason, several operators have found it more expedient not to accept these contractual obligations and to operate instead as unsubsidized operators in foreign and/or domestic commerce. Such operators generally have relied heavily on the carriage of cargo preference cargoes,[3] and they have been unable to generate programs for the construction of new vessels.

Sea-Land has many advantages of flexibility as an unsubsidized operator, which a subsidized operator does not have. The company has voluntarily chosen not to come under the operating-differential subsidy program, which is the stated policy of the United States for promoting liner operations by American-flag vessels.

Contrary to the impression which it would attempt to convey (*e.g.*, Appellant's Brief, p. 5), Sea-Land has not operated without significant governmental

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[3]See section 901(b) of the Act, 46 U.S.C. 1241b.

benefits. It has acquired nineteen (19) vessels, under most favorable terms, from the maritime reserve fleet under the Vessel Exchange Act, 46 U.S.C. 1160(i). In order to maximize tax advantages, it has sold several of its vessels, including those acquired from the Government under the Vessel Exchange Act, to associated companies, Litton Industries, Inc. and Coastal Ship Corporation, under sale and lease-back arrangements. This tax maneuver allows McLean – Sea-Land to charge off charter hire as a tax deductible expense, and it allows the associated companies, Litton Industries and Coastal Ship Corporation, to depreciate the vessels for tax purposes. McLean's large stockholders and associates have foreign-flag interests, which for a subsidized operator would be a violation of section 804 of the Act. It operates in the domestic trades with complete and unfettered freedom, and it has had several containerships converted by having midbodies constructed in foreign shipyards, including those which it has employed in the North Atlantic trade.

Sea-Land has not been willing, for reasons of its own choosing, to accept the obligations of a subsidized carrier or to bring itself within the national maritime policy of the United States as set forth in the Merchant Marine Act. Although before McLean sold its subsidiary Waterman several overtures were made to receive subsidy for Waterman's operations, neither McLean nor Waterman undertook to meet the qualifications of the Maritime Administration for a subsidized operator – tests which it would have been difficult or impossible for McLean to meet, in any event, because of (1) its complicated financial and leasing transactions, (2) the section 805(a) problems which would have been encountered, and (3) the foreign-flag interests of its associates.

The Merchant Marine Act contemplates a long-range program for promoting and maintaining adequate liner services by United States-flag vessels. Some of the differences in the nature of AEIL's operations and those of Sea-Land are worth noting:

(1) AEIL, as a subsidized operator, commits itself contractually to make a stated number of sailings on the routes which it serves – Sea-Land does not.

(2) AEIL is contractually committed to the orderly replacement of its vessels – Sea-Land is not.

(3) A subsidized operator cannot operate in the domestic trades, or extend operations in the domestic trades, without section 805(a) approval – Sea-Land can.

(4) A subsidized operator is bound by the provisions of section 804, concerning interests in foreign-flag operations – Sea-Land is not.

(5) A subsidized operator cannot acquire vessels from the Government under the Vessel Exchange Act – Sea-Land can and has.

(6) A subsidized operator cannot engage in sale-and-lease-back arrangements designed to maximize tax benefits and to increase working capital – Sea-Land can and has.

(7) A subsidized operator commits itself to observe the working capital and net worth requirements of the Maritime Administration and to set aside a portion of its earnings for vessel replacement – Sea-Land does not.

(8) A subsidized operator must construct, reconstruct and repair its vessels in United States shipyards – Sea-Land does not.

(9) A subsidized operator is required to operate only American-flag vessels in the trade – Sea-Land is not.

IV. THE SUBSIDY PROGRAM CONTEMPLATES THAT VESSELS WILL BE REPLACED BY NEW MORE PRODUCTIVE AND EFFICIENT VESSELS

In very few cases has an applicant for operating-differential subsidy had precisely the same vessels at the time of consummating an operating-differential subsidy agreement as it had when the application was filed. The substitution of vessels for those stated in the application has never been held to require a new section 605(c) hearing, and, of course, it is an essential part of the operating-differential subsidy program and of the subsidy contract that the vessels will be replaced. If Sea-Land's contentions were valid, a new section 605(c) hearing would be required whenever a subsidized operator replaced one of its vessels, and the Board would be under the extraordinary restriction of not being able to require or to allow in the public interst, and in furtherance of the purposes and policy of the Act, the substitution of newer more efficient vessels for older obsolete vessels, without further lengthy and expensive administrative rigamarole and hearings.

The new vessels that have been constructed for American-flag liner operators within the last three years have a productivity and annual carrying capacity of from two to four times as great as the ships that are being replaced. No subsidized American-flag liner operator has been required to undergo a new section 605(c) hearing merely because the new vessels it has placed in service have substantially more carrying capacity than the vessels that have been replaced. If indeed such a requirement were considered to be contained in the law, the Merchant Marine Act would stand as an obstacle to progress.

Sea-Land has advanced the specious argument that since AEIL's application for operating-differential subsidy contemplated initial operations with the SSs SIR JOHN FRANKLIN and REMSEN HEIGHTS,

> "the application of February 24, 1964, was of little, if any, competitive concern to Appellant as a carrier of cargo in intermodal containers in containerships." (Brief, p. 28).

This statement is incredible because no one could reasonably have assumed that AEIL would have continued, or indeed would have been allowed by the Board, to operate with obsolete war-built, break-bulk vessels on Trade Route 5-7-8-9 in perpetuity. Certainly everyone with the slightest familiarity with the steamship business was aware that the Board could not and would not have permitted such a dead-end and senseless operation. Prompt replacement of the war-built vessels, the SSs SIR JOHN FRANKLIN and REMSEN HEIGHTS, was always contemplated and indeed required. The only question in the administrative processing of AEIL's application was *when* the Board would require the vessels to be replaced.

As we have stated, Sea-Land is contending, in effect, that whenever a subsidized operator replaces its existing vessels with newer, larger and more productive vessels, a new section 605(c) hearing must be held. This contention is not only logically absurd, but it is dissonant with all existing precedents under the statute. An application for operating-differential subsidy envisages a long-term contract – not one limited to specific war-built vessels. The Board and its predecessors have consistently held that although the use of new, larger and faster type vessels will obviously increase available cargo capacity, such vessel replacement does not constitute "additional" service, within the meaning of section 605(c), because to adopt such an interpretation would put a penalty on incentive of United States-flag operators to improve their services and would be contrary to the purpose and policy of the Act. *Grace Line, Inc. – Subsidy, Route 25*, 4 FMB 549 (1954); *American President Lines, Limited – Subsidy, Route 17*, 4 FMB-MA 488 (1954). It is the obvious purpose of the Merchant Marine Act "to foster the development and

encourage the maintenance" of a merchant marine "composed of the best equipped, safest, and most suitable types of vessels". It has been consistently held that the types of vessels to be employed by either an applicant for subsidy or an existing subsidized operator on any foreign trade route is a matter to be determined by the most prudent judgment of the operator in consultation with the Board, involving issues other than those arising under section 605(c). In this respect, evidence relating to the types of vessels to be employed and the design features to be incorporated in new vessels has been held to be immaterial and irrelevant to the section 605(c) issues. *Matson Orient Line, Inc. – Subsidy – Route 12*, 5 FMB 410 (1958).

In *American President Lines, Ltd. v. Federal Maritime Board*, 112 F. Supp. 346 (1953), the District Court for the District of Columbia held that in applications for operating-differential subsidy a competitor's right to be heard is restricted to section 605(c) issues:

> "It is important to observe in this connection that section 605(c) of the Merchant Marine Act provides that in certain contingencies a public hearing must be held by the Commission, notice of which is to be given to each line serving the route. In other words, the Congress felt that under certain circumstances a competitor should have a right to be heard on the question whether a subsidy should be granted to a rival line." (112 F. Supp. at 349).

The District Court accordingly limited its review to the legality of the Board's action:

> ". . . the court is of the opinion that the Board did not transcend any of the limitations of section 605(c) in granting subsidies to the two defendant steamship lines." (112 F. Supp. at 350).

As stated in the Board's Notice in the *Federal Register* of April 1, 1964,

> "In the event a hearing is ordered to be held on the application under section 605(c), the purpose thereof will be to receive evidence relevant to (1) whether the application is one with respect to vessels to be operated on a service, route or line served by citizens of the United States which would be in addition to the existing service, or services, and, if so whether the service already provided by vessels of United States registry in such service, route or line is inadequate, and (2) whether in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon."

No hearing on any subsidy application, under section 605(c), has ever properly included inquiries into the types of vessels to be employed, *American President Lines, Ltd.–Subsidy, Route 17,* " F.M.B.-MA 488 (1954); or the financial need to meet foreign-flag competition, *American President Lines, Atlantic/Straits Case,* 1 SRR 743 (1962).

Congress has determined, in enacting the operating and construction-differential subsidy programs set forth in the Merchant Marine Act, that it would not be provident or consistent with the public interest to hold public hearings on the many issues before the Board in determining such subsidy applications. No hearings are provided for under the construction-differential subsidy program, in Title V of the Act, and none has ever been held on a pending application. The Maritime Subsidy Board in the *American President Lines, Atlantic/Straits Case,* 1 SRR 743 (1962), reaffirmed the prior administrative decisions and set forth most clearly the legislative history of the statute (in Legislative History Appendix, mimeo pages III-X). In that decision, affirmed by the Secretary of Commerce, the Board pointed out that the public hearing phase of the subsidy procedure is restricted to both parts of section 605(c), section 602 and possibly section 606(3). Neither of the latter

sections is applicable here. The issues arising under sections 601(a)(3), 601(a)(4) and 606(4) are intended to be handled administratively.

On this very route (*viz.*, Trade Route 5-7-8-9) where Sea-Land is contending that AEIL was foreclosed from replacing the SSs SIR JOHN FRANKLIN and REMSEN HEIGHTS, United States Lines, Inc. and Moore-McCormack Lines, the largest subsidized American-flag carriers in the North Atlantic trade, are now greatly increasing their carrying capacity by replacing existing vessels with containerships. United States Lines, which has the authority to make 269 subsidized sailings annually in the trade (as opposed to the present maximum of 26 by AEIL) is now having six (6) full containerships constructed for the North Atlantic trade. According to the evidence offered by United States Lines in a pending proceeding before the Maritime Subsidy Board, United States Lines, with the introduction into service of its containerships, will approximately double its annual carrying capacity on the route. (See MSB Docket Nos. S-199 (Sub-2), S-203, USL Exs. 2, 11, 12 – these exhibits show an annual carrying capacity of approximately 108 million cubic feet in 1966 as compared with a projected carrying capacity of about 212 million cubic feet in 1968). Similarly, Moore-McCormack Lines, which presently has the authority to make a total of 56 sailings yearly on Trade Route 8, is having four (4) roll-on/roll-off container vessels constructed, which will more than double the carrying capacity of that line on the route. Curiously enough, Sea-Land has not contended, as logic would compel it to do, that United States Lines and Moore-McCormack should be compelled to undergo section 605(c) hearings before being permitted to introduce service with their new container vessels and roll-on/roll-off ships.

CONCLUSION

The District Court properly upheld the Maritime Administration in its determination that a hearing had been noticed and granted on Appellee's application of February 24, 1964; that Appellee's proposal of April 7, 1965 to replace vessels was merely an amendment to the application requiring no additional notice of hearing; that the hearing and administrative procedures required under Section 605(c) of the Act were lawfully and properly followed and that the discretionary authority exercised by the Maritime Administration was reasonable.

The Order of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of November, 1968, served a copy of the foregoing brief upon John Mason, Esq., Ragan and Mason, 900 17th Street, N. W., Washington, D. C., counsel for appellant and upon Leavenworth Colby, Esq., Department of Justice, Washington, D.C., counsel for appellee, by mailing copies so addressed to them, first-class mail, postage prepaid.

James N. Jacobi

BRIEF FOR APPELLEES JOHN T. CONNOR, et al

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,140

SEA-LAND SERVICE, INC.,

Appellant,

v.

JOHN T. CONNOR, et al,

Appellees.

ON APPEAL FROM FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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COUNTERSTATEMENT OF ISSUES

1. Did plaintiff-appellant have standing to assert invalidity of a subsidy award for lack of notice and hearing where (a) its petition for reconsideration was denied on the merits after full consideration of the whole record, and (b) it was not yet in competition with the service to be subsidized?

2. If plaintiff-appellant has standing, did Maritime exceed its discretion in holding that the substitution of two larger containerships for two smaller break-bulk vessels did not constitute an addition to existing service so as to make notice and hearing prerequisite to an award of subsidy?

COUNTERSTATEMENT OF THE CASE

This case arises out of unanimous decisions, opinions and orders of the defendants-appellees Secretary of Commerce, Maritime Subsidy Board and Maritime Administrator (JA 5-21) which denied the petition of plaintiff-appellant Sea-Land Service, Inc., to reopen, reconsider and reverse defendants' prior decision of August 12, 1965, granting construction and operating differential subsidy for two vessels on Trade Route 5-7-8-9 (U. S. North Atlantic ports to Northern European

ports) to intervenor-appellee American Export Isbrandtsen Lines, Inc.[1/]

Maritime's denial of Sea-Land's petition was solely on the merits after full reconsideration of the entire record, including the affidavit of additional facts attached to the petition. The original opinion of September 9, 1965 (JA 5-17) was further clarified on this point by a Supplemental Opinion of September 30, 1965(JA 18-20), making it absolutely clear that denial was on the merits and after full reconsideration. Sea-Land's petition for secretarial review of the denial was in turn denied by the Secretary's Order of October 4, 1965 (JA 21). This civil action to review, enjoin and set aside Maritime's decisions was begun by a complaint (JA 22-29), filed October 20, 1965, and dismissed on motion for summary judgment by a final order of the district court (JA 114-115), entered April 15, 1968. Timely notice of appeal (JA 115) was filed June 11, 1968.

The facts are without substantial dispute. On March 5, 1962, Export, a subsidized operator, had been granted permission to operate on a non-subsidized basis on Trade Route 5-7-8-9, not over 18 sailings per year of the "S.S. Remsen Heights" and "S.S. Sir John Franklin", two break-bulk vessels of a dry cargo capacity of 453,000 and 451,000 cubic feet,

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1/ Hereinafter the parties are referred to as "Maritime", "Export" and "Sea-Land".

respectively (JA 38). On February 24, 1964, Export filed with Maritime its original application for operating differential subsidy on its already existing non-subsidized service for a minimum of 15 and a maximum of 26 sailings annually with the "Remsen" and "Franklin" or with modern replacement vessels (JA 39, RA Att. 1).[2/]

Export's 58-page application expressly stated that "Subsidy aid is needed if the existing service presently provided by these vessels is to persist and be replaced with modern tonnage (id. p. 20). It emphasized repeatedly Export's intention and ability very shortly to replace the "Remsen" and "Franklin" with new vessels of a modern and larger type (id. pp. 19, 34, 38-39, 43-44). Export's application also emphasized its "existing service" status under § 605(c), 46 U.S.C. 1175, as a Route 5-7-8-9 operator (RA Att. 1, pp. 15, 18, 24, 45), and the fact that the inadequacies of United States flag service and the need for operation of additional vessels was already established by Maritime's previously reported decisions and staff studies (id. pp. 24, 34, 50-52).

On April 1, 1964, Export's application was duly noticed in the Federal Register, 29 F.R. 4686 (JA 40, RA 8), pursuant to defendants' Rule 7 (46 C.F.R. 201.71 et seq.), which provides for notice by Maritime wherever a "statute requires

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2/ References "RA Att." here and hereafter are the attachments to Sea-Land's Requests for Admissions and are parts of the original record in this Court which may be relied on under Rule 30(a) of the Federal Appellate Rules.

public hearing" or Maritime in its discretion directs the holding of "a hearing not required by statute." The notice expressly declared that "If no request for hearing and petition for leave to intervene is received" or if it is determined that the petitions filed do not "demonstrate sufficient interest to warrant a hearing" such action will be taken "as may be deemed appropriate." Until it withdrew, Waterman S.S. Co., which like appellant Sea-Land, was a wholly-owned subsidiary of McLean Industries, Inc., with two common officers, the Chairman of the Board and Vice-President-Treasurer,[3/] was the only intervenor (JA 11-12). On May 25, 1964, following a prehearing conference, the Chief Hearing Examiner referred the matter for administrative processing without hearing (JA 40).

Following staff discussions concerning the wisdom of subsidy for the soon to be replaced "Remsen" and "Franklin", Maritime, on March 11, 1965, found that § 605(c) was not a bar to Export's application, but deferred further consideration thereof pending the submission, on April 7, 1965, of Export's supplemental application to substitute two larger containships to be purchased, reconstructed and thereafter operated in lieu of the existing service with the "Remsen" and "Franklin" by a subsidiary of Export which would be organized only if Maritime

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3/ Affidavit and Annual Report of McLean Industries, Inc., for 1964, attached to Sea-Land's Petition for Reconsideration (RA Att. 29). See also Petition for Review (RA Att. 33, p. 11).

approved, and designated by the name "Container Marine Lines, Inc." (JA 8, 41-43; RA Att. 12).

Export's supplemental proposal of April 7, 1965, when submitted, did not include the detail required under 46 C.F.R. 201.76 for the original application. It complied instead with 46 C.F.R. 201.77, providing that amendments or supplements "will be allowed or refused in the discretion of the Administration if the case has not been assigned for hearing." It was accordingly not formally noticed in the Federal Register, but publication of Maritime's consideration of Export's April 7, 1965, proposal was made by an official press release "MA NR 65-60" of May 26, 1965 (RA Att. 21) carried not only by the New York Times of May 27, 1965, and other newspapers, but in full by the "Congressional Information Bureau", a trade journal of general circulation in the shipping industry (JA 46).

On August 19, 1965, Maritime published an official press release "MA NR 65-84", announcing that it had approved Export's application for construction and operating differential subsidy for the two replacement containerships for operation on Route 5-7-8-9 (U. S. Atlantic to U. K. and Continent" for a minimum of 18 and maximum of 26 sailings per year, but had refused interim subsidy for the "Remsen" and "Franklin". Approval was stated to be based on a finding that United States ships carry less than 25 percent of the trade on the route (RA Att. 28).

Sea-Land, upon learning of Maritime's approval of Export's proposal, obtained copies of the pertinent papers relating to

Maritime's actions, and on September 1, 1965, filed a petition for rehearing pursuant to 46 C.F.R. 201.174 urging Maritime to "reopen the matter, reconsider and reverse their actions of August 12, 1965" (RA Att. 29, p. 22). This petition did not request a rehearing to receive additional evidence and accordingly did not comply with the requirement for a statement concerning "the nature and purpose of the new evidence to be adduced." The petition was limited to arguments based on the pre-existing record plus an attached affidavit showing that Sea-Land entertained hopes that it could inaugurate containership service on Route 5-7-8-9 by March 1, 1966.

Maritime's unanimous decision, opinion and order (JA 5-17), which the present action seeks to review, enjoin and set aside, expressly declared (JA 9) that:

> Under the circumstances, it now becomes necessary for the Board to take appropriate action on the merits of the petition and, having done so, submit the matter again to the Department of Commerce for appropriate review in keeping with the provisions of D. O. 117 (Revised). Having reviewed the petition, we find that it presents nothing of consequence and nothing that would in any manner establish improper or illegal action by the Board under all pertinent provisions of the 1936 Act.

It concluded by denying the petition and reaffirming the prior finding and determinations. Sea-Land's petition for secretarial review, filed September 20, 1965 (RA Att. 33), like its petition for reconsideration, contained no demand that the reception of additional evidence should have been permitted, but was limited to the contention that Maritime's

decision was erroneous and invalid because of failure to publish formal notice of Export's April 7, 1965, proposal in the Federal Register.

Sea-Land's December 20, 1965, complaint (JA 22-29) to review, enjoin and set aside Maritime's action alleged standing by reason of its intention to inaugurate a competing containership service on March 1, 1966 (JA 23). The complaint attacked the denial of Sea-Land's petition for reconsideration (JA 26), alleged that Maritime's proceeding without formal notice and public hearing was unlawful (JA 27-28), and asserted irreparable injury because of the "pricing advantage" resulting from the subsidy (JA 28). Sea-Land prayed for an order (1) enjoining the entering into any subsidy contract until a formal hearing followed by new findings, and (2) setting aside the administrative decisions which denied Sea-Land's petitions for reconsideration and secretarial review (JA 28-29).

The answer (JA 29-30) stated as special defenses the failure to state a claim on which relief can be granted and Sea-Land's lack of sufficient interest to give it standing. The case came on for hearing on Sea-Land's motion for summary judgment. In dismissing the action Judge Holtzoff stated that he had not found it necessary to reach the question of Sea-Land's standing to bring the action (JA 56). He held that the statute, § 605(c), 46 U.S.C. 1175(c), requires formal hearings "only in those cases in which the service to be subsidized would be in addition to the existing service" (JA 112). He further held that, if notice

was required, the notice of the original application was sufficient as to the "new application, which may be, in a sense, regarded as an amended application, substituting two other ships for the two named in the original application," and Maritime's view that no further notice and hearing was required was reasonable (JA 55-56). His oral opinion concluded:

> In a sense, the Maritime Administration took the position that the new application was practically an amendment of the old and, therefore, no new hearing need be noticed. The Court is of the opinion that that was a reasonable view and is in full accord with it. In any event, it was within the discretion of the Maritime Administration to so construe the application.

STATUTORY BACKGROUND

Perspective can best be gained as to the issues in this action if we summarize the statutory background of the Merchant Marine Act of 1936, as amended. That Act, 46 U.S.C. 1101 et seq., embodies a broad and comprehensive scheme to further the development and maintenance of an adequate and well-balanced American merchant marine. See Preamble of the Act, 49 Stat. 1985.

The Act's Declaration of Policy is found in Title I. It provides in Section 101 (46 U.S.C. 1101):

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service

> on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

To the end that these avowed purposes be accomplished, Congress, in Title II of the Act, created the United States Maritime Commission, Section 201 et seq. (46 U.S.C. 1111 et seq.), with numerous, broad and discretionary powers, including the authority to grant economic assistance directly to United States citizens in order to meet foreign-flag competition and to promote the foreign commerce of the United States. These powers respecting government aids are now vested in the Secretary of Commerce and the Maritime Administrator and Maritime Subsidy Board by reason of 1961 Reorganization Plan No. 7, 75 Stat. 840.

The Act authorizes the award of two kinds of subsidies. By Title V of the Act, Congress empowered Maritime to award financial aid to an applicant in the form of a construction-differential subsidy based on the difference between foreign and American shipbuilding costs, Section 501 et seq. (46 U.S.C. 1151, et seq.), and in Title VI, empowered them to award similar aid in the form of an operating-differential subsidy based, in substance, on the difference between foreign and American

operating costs, Section 601 et seq. (46 U.S.C. 1171 et seq.). Only the latter type of subsidy is involved in this litigation.

By Title VI, which deals specifically with the operating type of subsidy, Congress, in implementing the purposes of the Act set forth above, prescribed a variety of conditions precedent and qualifications prerequisite which Maritime must determine before approval of applications for financial aid in the operation of United States flag vessels. These are contained in Sections 601(a), 601(b), 602, 605(a), 605(b), 605(c), 610 and in Section 805(a) (46 U.S.C. 1171(a), 1171(b), 1172, 1175(a), 1175(b), 1175(c), 1180 and 1223(a).) It suffices to point out that, in the award of operating-differential subsidies under this title, Congress authorized Maritime to determine in its discretion whether or not in the particular case an applicant meets the statutory standards contained in these sections. Congress intended Maritime to make continual staff investigations for these purposes. It made in only a few instances provisions for a public hearing. It sought generally to relieve applicants of the protracted delays and heavy expenses which they entail.

Section 601(a) (46 U.S.C. 1171) contains no requirement for public hearings and provides:

> The Commission is authorized and directed to consider the application of any citizen of the United States for financial aid in the operation of a vessel or vessels, which are to be used in an essential service in the foreign commerce of the United States. No such

> application shall be approved by the Commission unless it determines that (1) the operation of such vessel or vessels in such service, route, or line is required to meet foreign-flag competition and to promote the foreign commerce of the United States, and that such vessel or vessels were built in the United States, or have been documented under the laws of the United States not later than February 1, 1928, or actually ordered and under construction for the account of citizens of the United States prior to such date; (2) the applicant owns, or can and will build or purchase, a vessel or vessels of the size, type, speed and number, and with the proper equipment required to enable him to operate and maintain the service, route, or line, in such manner as may be necessary to meet competitive conditions, and to promote foreign commerce; (3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary to enable him to conduct the proposed operations of the vessel or vessels as to meet competitive conditions and promote foreign commerce; (4) the granting of the aid applied for is necessary to place the proposed operations of the vessel or vessels on a parity with those of foreign competitors, and is reasonably calculated to carry out effectively the purposes and policy of this Act.

Section 602 (46 U.S.C. 1172) contains a hearing provision which emphasizes that in ordinary cases of subsidy to meet direct foreign competition no public hearing is required:

> Except with respect to cruises authorized under section 1183 of this title, no contract for an operating-differential subsidy shall be made by the Federal Maritime Board for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Board, after a full and complete investigation and hearing, shall determine that an operating-differential subsidy is necessary to meet competition of foreign-flag ships.

Section 605(c) (46 U.S.C. 1175) contains only a conditional requirement for hearings when the service to be subsidized is found by Maritime to be "in addition to existing service" or "give undue advantage or be unduly prejudicial" to competitive United States services. It provides:

> [1] No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and
>
> [2] no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines, unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.
>
> [3] The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper. [Numbers in brackets and emphasis added for convenience of reference.]

By the foregoing provisions, Maritime was required to find and determine, under clause one of § 605(c), only that Export was in fact already operating an existing two-vessel service on Route 5-7-8-9 so that the substitution of the two subsidized containerships would be in replacement of and not "in addition to the existing service," and, under clause two, only that the subsidy contract for Export would not "give undue advantage or be unduly prejudicial" to any ship operator "in competitive services, routes or lines." When Maritime can make these initial findings, § 602 and § 605(c) require no public hearing to determine "adequacy" or "necessity."

Once the facts of direct foreign competition, no additional service and no undue advantage or prejudice are found, § 605(c) does not require a determination on the basis of public hearings, the fact already well known to Maritime, that there is a present inadequacy of United States flag service and that the subsidy is necessary to provide adequate service by United States vessels. Public hearings are required only when such a further determination of inadequacy and necessity follows after an initial finding by Maritime of "additional service" and "undue advantage and prejudice." In other words, the public hearing is intended to protect the applicant against Maritime's denial. Its purpose is not to protect possible intervenors (like Sea-Land here), nor to permit them to delay interminably the grant of subsidy.

ARGUMENT

Sea-Land obtained from Maritime the reopening and reconsideration on the merits of the decisions of August 12, 1965, granting subsidy to Export. Sea-Land's petition did not ask rehearing and reception of additional evidence nor did it comply with the rule requiring a statement as to what additional evidence it sought to have received. It thus seems that Sea-Land had notice and obtained all the consideration and "hearing" it asked for. Nonetheless, as stated in its brief, Sea-Land's contention on this appeal is that such consideration by Maritime of the merits of its contentions is not enough, and that the Court should enjoin and set aside Maritime's decisions under a further public hearing after formal notice can be had so as to protect the interests not of Sea-Land but those of other unspecified third-parties--the "all parties" mentioned in § 605(c) (Br. 38-39, 45).

In this brief we will urge first, that Sea-Land has no cause of action or standing to sue because it has not suffered any legal wrong by the lack of public hearing after formal notice. Not only was Sea-Land not a party "affected or aggrieved" within 5 U.S.C. 702, because it obtained appropriate consideration or "hearing" on the merits of its own contentions and has no standing as a private Attorney General to sue to protect the possible interests of unspecified third

parties to a public hearing after formal notice; Sea-Land was also never a party "affected or aggrieved," because it was not the operator of an "existing service" in competition with the service to be subsidized until long after Maritime's denial of its petition on the merits. Second, we urge that Maritime's determination, that the two containership service is not an additional service when it replaces the existing two break-bulk vessel service, may not be set aside unless it is irrational and thus that Maritime properly held Export's April 7, 1965, proposal to be a § 201.77 "amendment or supplement" to its original application of February 24, 1965, and not a new application. Finally, we will urge that § 602 and § 605(c) in terms do not require public hearing of even other lines "serving the route" where, as here, Maritime has first determined, under § 605(c), that the service with the two replacement containerships to be subsidized is not additional to the existing service with two break-bulk vessels and its subsidy will not give undue advantage or be unduly prejudicial as between competing United States services and, under § 602, that the subsidy is necessary to meet direct foreign flag competition.

I. SEA-LAND LACKS JUDICIAL STANDING

A. Sea-Land has no judicial standing because it obtained consideration of its own contentions and was thus not adversely affected in fact by the lack of formal notice and public hearing.

Sea-Land is not contending on this appeal that Maritime's award of subsidy to Export violates any of the substantive limitations imposed by Congress, but only that the award was made without compliance with the prescribed procedures as to public hearing after formal notice. Sea-Land expressly so states in arguing that it has judicial standing to maintain this action. Thus it says (Br. 38-39):

> Appellant would have grave doubts over the validity of its standing if we were here contesting the merits of the agency action in awarding a subsidy contract after proper notice and hearing. But we are not. Appellant asserts that its aggrievement is a direct result of failure by the MA/MSB to afford Appellant specifically, and the public generally, the [public] hearing required by the plain meaning of the relevant statute; Section 605(c). In other words, the agency action that was the nexus to the aggrievement within the meaning of the relevant statute was the unlawful failure to notice and to hear prior to award--not the making of the award which, when lawful procedures are followed, is discretionary.[4/]

Sea-Land did not itself, of course, suffer harm from the absence of formal notice of public hearing because it obtained a "hearing" or consideration of its affidavit and contentions on its petition for reconsideration. TI Broadcasting, Inc. v. F.C.C., 126 U.S. App. D.C. 54, 374 F.2d 268 (1966).

4/ So held by Judge Holtzoff in American President Lines v. F. M. B., 112 F. Supp. 346 (D. D.C. 1953).

Sea-Land did not ask Maritime for a public hearing in order to offer new oral evidence in addition to its affidavit. It limited its petition to the contention that Maritime's action was (1) invalid, because of its failure to publish formal notice in the Federal Register and hold public hearings for the benefit of unnamed parties, and (2) erroneous as a matter of law because of its refusal to draw a distinction between two containerships and two break-bulk ships in determining the adequacy of existing United States flag service. In the constitutional sense, Sea-Land obtained a full "hearing" for itself on these points when Maritime fully considered and rejected its petition on the merits. Thus it suffered no harm. Sea-Land had no right to a public trial-type hearing when it did not ask for it and meet the requirements of 46 C.F.R. 201.174.

Neither the Administrative Procedure Act nor the Fifth Amendment require a trial-type hearing in every case where "hearing" is required. Hearing means "the right to support his allegations by argument, however brief, and, if need be, by proof, however informal." London v. Denver, 210 U.S. 373, 386 (1908). But even for the most important of constitutional issues the Supreme Court has not required oral argument. Santa Clara County v. Southern Pacific R.R., 118 U.S. 394, 396 (1886). It has applied the same rule to administrative bodies. F.C.C. v. WJR, The Goodwill Station, 337 U.S. 265, 274-276 (1949); American Broadcasting Co. v. F.C.C., 85 U.S.

App. D.C. 343, 179 F.2d 437, 442 (1949).[5/]

The requirement of hearing was sufficiently complied with, so far as concerns Sea-Land itself because it had actual knowledge and was heard to the extent necessary. As long as Maritime not only afforded Sea-Land an opportunity by its petition for reconsideration to submit its affidavit of the facts which it felt were material together with its arguments of fact and law, but further carefully considered and decided Sea-Land's facts and arguments on the merits in its opinion of September 10, 1965 (JA 5-17), Sea-Land has no ground of complaint. Such a brief informal hearing was sufficient for Maritime properly to conclude that those facts were both undisputed and irrelevant to its August 12, 1965, decision to award subsidy. Persian Gulf Outward Freight Conf. v. F. M. C., 126 App. D.C. 159, 375 F.2d 335, 340-341 (1967); Mississippi River Fuel Corp. v. F. P. C., 108 U.S. App. D.C. 284, 281 F.2d 919, 927 (1960), cert. den. 365 U.S. 827; American Export & Isbrandtsen Lines v. F. M. C., 334 F.2d 185, 194 (9th Cir. 1964); Producers Livestock Mkt'g Assn. v. United States, 241 F.2d 192, 195-196 (10th Cir. 1957), aff'd 356 U.S. 282; cf. Fugazy Travel Bureau v. C. A. B., 121 U.S. App. D.C.

5/ We do not understand Sea-Land to argue that when it intervened pursuant to actual knowledge it can still complain of the absence of formal notice in the Federal Register. See W. J. Diller Trf. Co. v. United States, 101 F. Supp. 506, 509 (W.D. Penna. 1951); C. E. Hall & Sons v. United States, 88 F. Supp. 596, 600-601 (D. Mass. 1950); Florida Citrus Com'n v. United States, 144 F. Supp. 517, 521 (N.D. Fla. 1956), aff'd 352 U.S. 1021.

355, 350 F.2d 733, 738-740 (1965); Lincoln Transit Co. v. United States, 256 F. Supp. 990, 993 (S.D.N.Y. 1966); See 1 Davis, Administrative Law, § 7.01 (1958). That other still unknown third parties may not have been able to intervene and ask reconsideration does give Sea-Land a cause of action nor a standing to sue.

Sea-Land gains no additional standing as protector of the rights to public hearing of other parties unknown, such as the "shipper associations, port interests, carriers indirectly affected", whose possible interests it invokes (Br. 45). These interests are other persons for the purposes of the Shipping Act, 46 U.S.C. 801 et seq. City of Los Angeles v. F. M. C., 385 F.2d 678, 680 (9th Cir. 1967). They are not such as to subsidy and have not appeared nor intervened in Sea-Land's cause.

Sea-Land's invocation of possible adverse affect on third parties does not help. It is elementary that plaintiffs who are not themselves adversely affected in fact may not gain standing by turning themselves into private Attorneys General and institute actions to compel administrative observance of the legal rights of third parties. Thus, McGowan v. Maryland, 366 U.S. 420, 429-431 (1961), refused to allow store employees on trial for selling goods on Sunday to argue that the blue laws violated the religious freedom of other unidentified third parties who might be Sabbatarians. Again, United States v.

Raines, 362 U.S. 17, 21-23 (1960), denied state officials sued under a statute forbidding interference with Negro voting the right to argue that, applied to private individuals, the statute would be unconstitutional. In the same way, Tileston v. Ullman, 318 U.S. 44, 46 (1943), held that a doctor could not sue to assert his patients' rights to birth control information, although when on trial for a violation the doctor can argue that because of his patients' rights to contraceptives the criminal statute was unconstitutional. Griswold v. Connecticut, 381 U.S. 479 (1965). So earlier, Tennessee Power Co. v. TVA, 306 U.S. 118, 144 (1939), denied standing to power companies to argue that states' rights were infringed by federal loans to municipalities. See, Sedler, "Standing to assert constitutional jus tertii," 71 Yale L. J. 599 (1962).

We have thus shown that Sea-Land was not "affected or aggrieved" in fact by lack of public hearing after formal notice because in fact it obtained an adequate informal hearing of its contentions. It remains to point out that Sea-Land equally was not a party "affected or aggrieved" within the meaning of the statute because, at the time Maritime acted and the present action was filed, Sea-Land had no legally protected right as a possible future competitor of the service to be subsidized. Even if consideration of its petition was not a sufficient "hearing" it still lacks standing. As we shall also show, the circumstance that here Maritime permitted Sea-Land to intervene, that § 605(c) refers to the making of

the contract, not to the award of subsidy, and to "hearing all parties," does not confer judicial standing on Sea-Land to maintain this action as future competitor.

B. Sea-Land has no judicial standing because it was not operating an existing competitive service when it intervened before Maritime and thus could not be a party affected or aggrieved.

We submit that when, in August to October, 1965, Sea-Land petitioned Maritime to reconsider the award of subsidy and then filed this suit, Sea-Land was without standing because it was not "a line serving the route" in competition with Export's existing non-subsidized operation on Routes 5-7-8-9. Thus, when the present action was brought Sea-Land could suffer no present injury and possessed no right protected by law. Its inauguration of service on the route in March 1966 did not operate retroactively to confer standing in 1964 and 1965.

Sea-Land concedes it was not serving the route but only its affiliate Waterman was serving Route 5-7-8-9. Waterman, however, had withdrawn its intervention and did not join Sea-Land by reasserting its prior intervention. Sea-Land's reliance on Waterman's actions (Br. 44) is thus footless when Sea-Land itself was merely taking steps looking toward future inauguration of service on Route 5-7-8-9, which it did not do until nearly a year later.

In an attempt to bring itself within § 605(c) Sea-Land argues that its 1965 intention to inaugurate service on

Route 5-7-8-9 when followed by its actual commencement of such service in March 1966, confers standing for its present previously filed complaint of October 20, 1965, to review Maritime's decision of September 10, 1965, which rejected on the merits Sea-Land's petition for reconsideration. Sea-Land points out that § 605(c) employs the expression "no contract shall be made," and provides for "proper hearing of all parties" as well as for hearing after notice "to each line serving the route." The subsidy contract was not executed until June 1966, although awarded on August 12, 1964, and by the time of execution Sea-Land was a line serving the route.

There seem to be two aspects of Sea-Land's argument. One is that the addition of the words "hearing of all parties" to the words notice "to each line serving the route" fix the scope of the parties having standing as including those who may be affected only contingently or subsequently and indirectly. The other is that the words "no contract shall be made" fix the execution of the contract as the time to test standing. We submit that neither aspect helps Sea-Land here.

At the outset it must be observed that Sea-Land does not appear to argue that it gains standing from the mere fact that Maritime allowed it to intervene and decided its petition for reconsideration on the merits. That, like many agencies, Maritime chooses to utilize hearings, under 46 C.F.R. 201.71, as a convenient supplement to staff studies in securing a more informed basis for the exercise of its power to grant subsidies

does not confer standing nor require Maritime to do so in every case. See Bridgeport Fed. Sav. & L. Ass'n v. Fed. Home Loan Bank Board, 307 F.2d 580, 582-583 (3d Cir. 1962), cert. den. 371 U.S. 950. In Pittsburgh & W. Va. Ry. v. United States, 281 U.S. 479, 486 (1930), where the district court had based its conclusion of standing partially upon that fact, the Court, in reversing, said "The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened injury to it." Accord, Seatrain Lines v. United States, 152 F. Supp. 619, 622 (D. Del. 1957), aff'd 355 U.S. 181, collecting cases.

Sea-Land's argument is only that Maritime's action in considering its petition for reconsideration on the merits and permitting intervention by other prospective competitors shows a recognition that the status of prospective competitor confers standing under § 605(c) (Br. 43-44). Even that cannot help Sea-Land in the well settled state of the authorities concerning such statutory grants of standing.

The short answer to Sea-Land's arguments is that the expression "proper hearing of all parties" in § 605(c) of the Merchant Marine Act, 1936, derives from similar provisions of the Transportation Act, 1920 (49 U.S.C. 1 (19) and (20)), and the Motor Carrier Act, 1935 (49 U.S.C. 305(h)), conferring standing on "all parties in interest." Under the Act of 1920 it had been held that a carrier, which applied to the I.C.C.

for authority to construct a competing line, made surveys and adopted a definite location for its route, has standing as a party in interest. Western Pac. R.R. Co. v. Southern Pacific Co., 284 U.S. 47 (1921), reversing 46 F.2d 729 (9th Cir. 1931). Bur we know of no case, nor has Sea-Land cited one[6/] where the intention to become a prospective competitor without such an application, or in a situation where no application for governmental approval is required, has been held sufficient to confer standing.

Ordinarily, to have standing as a party in interest, a plaintiff needs something more than the indirect or prospective affects of competition or a common concern for proper compliance with law. L. Singer & Sons v. Union Pacific R.R. Co., 311 U.S. 295, 302 (1940); Atchison, Topeka & Santa Fe Ry. Co. v. United States, 130 F. Supp. 76 (E.D. Mo. 1955), aff'd 350 U.S. 892. The results of lawful competition cannot of themselves confer standing. Only when the statutory provision invoked reflects

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6/ Sea-Land (Br. 44) cites Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945), and similar cases, but in those, like Western Pacific, plaintiff had an inconsistent application pending. Sea-Land can only quote this Court's dictum in Wirtz v. Baldor El. Co., 119 U.S. App. D.C. 122, 337 F.2d 518, 533 (1964). That dictum, however, concerned the rights of possible future contractors with the Government to join as plaintiffs in a Walsh-Healey Act proceeding in addition to those already contracting. Cf. Rules 20(a) and 21, F.R. Civ.P. National Motor Freight Ass'n v. United States, 372 U.S. 246 (1963). Absent an application, this Court has held there is no standing to sue. Mansfield Journal Co. v. F.C.C., 84 U.S. App. D.C. 341, 173 F.2d 646, 647-648 (1949); Telegraph Herald Co. v. F.C.C., 62 U.S. App. D.C. 240 (1933).

a legislative purpose to protect the particular competitive interest of the plaintiff does he have standing to require compliance with the provision. Hardin v. Kentucky Utilities Co., 390 U.S. 1, 5-6 (1968).

Thus, cases such as Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966), and Whitney Nat. Bank v. Bank of New Orleans, 116 U.S. App. D.C. 205, 323 F.2d 290, 300 (1963), reversed on other grounds 379 U.S. 411, do not aid Sea-Land. As pointed out in Penna. R.R. Co. v. Dillon, 118 U.S. App. D.C. 257, 335 F.2d 292, 297, fn. 6 (1964), cert. den. 379 U.S. 945, in Whitney, this Court had expressly found that the federal statute guaranteed all state banks complete freedom from competition by national banks. The cases where there was no such express prohibition were pointedly distinguished. These too are cases where a holder (or applicant) of an exclusive license or franchise is held to have standing to attack governmental action which impairs this right to be free of competition.

Sea-Land can make no such claim. It is not a cross-applicant for subsidy nor the holder of an exclusive license for Route 5-7-8-9. Both Whitney and the terms of § 605(c) are thus of no help to Sea-Land because the purpose of § 605(c) was not to protect all parties, but only those parties actually interested at the time of Maritime's action. As shown by its text, § 605(c) is limited in terms to actual current competitors--"lines serving the route" or those similarly situated. It does

not embody a Congressional purpose to protect prospective competitors who are unsubsidized, unregulated, and like Sea-Land here, are free to start or stop their intended competition from moment to moment.[7/]

Section 605(c) and its hearing provisions show on their face that their purpose was to permit applicants to show they are eligible for awards of subsidy, although Maritime has found that the application would involve additional service or that subsidy would give the applicant undue advantage to the prejudice of existing competitors. Its purpose was not to permit imposition on the applicant of the delays and expenses of formal notice, trial-type public hearings and judicial review by every person or every shipping line which might some day want to become a prospective competitor on the route. Provision for standing to be heard and bring suit for review by every one claiming an intention to compete at a later time would be as unworkable

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7/ Sea-Land's contention that the expression "no contract shall be made" indicates a Congressional intent to require Maritime to speculate on possible future developments between the date of the award and the date of the contract is without foundation in common sense or legislative history. Consideration of intervening changes of condition has nearly always been rejected as unworkable. As the Court said in I.C.C. v. Jersey City, 322 U.S. 503, 514 (1944): "If upon the coming down of the order litigants might demand rehearing as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." See also, Virginia Petrol. Jobbers Ass'n v. F.P.C., 110 U.S. App. D.C. 339, 293 F.2d 527, 529-530 (1961); cf. United States v. Pierce Auto Lines, 327 U.S. 515, 534-536 (1946), holding the need of rehearing to update the record is a decision for agency discretion, not for court review. Parr v. F.C.C., 120 U. S. App. D.C. 156, 344 F.2d 539, 541 (1965).

for subsidy as it would be for authorization of new national banks or branching by existing ones.

We have thus shown that Sea-Land lacks standing because it obtained the only type of "hearing" its petition demanded and because it was not either an existing line serving the route nor a cross-applicant for subsidy. In point II we will show that, even if Sea-Land has standing, which we deny, Maritime's determination that Export had grandfather rights, because it was seeking subsidy for existing, not additional service when it proposed to replace the "Remsen" and "Franklin" with containerships, fully justifies its decision not to publish a second formal notice and not to hold public trial-type hearings.

II. THE CONTAINERSHIPS WERE NOT ADDITIONAL SERVICE; HEARINGS WERE NOT REQUIRED

A. Export's containership proposal of April 1965 was not for additional service and Maritime correctly held it to be only an amendment or supplement of the original 1964 application.

We have seen (supra, pp. 4-6) that the form and content of Export's April 1965 proposal (made following staff discussions) to substitute two containerships, as the replacements contemplated by the terms of the original application of February 24, 1964, for the "Remsen" and "Franklin", shows that the April proposal could only be an amendment or supplement under 46 C.F.R. 201.77 and not a new original application. Clearly it did not meet the requirements of § 201.76 for a new,

original subsidy application. Sea-Land's contentions thus raise no more than the question of whether it was an abuse of discretion for Maritime to accept Export's April 7, 1965, proposal as an amendment or supplement on the basis that the substitution of containerships did not constitute an "addition to the existing service." If, as Sea-Land argues, it was for an addition, it had to be treated as a new application, because Maritime had already ruled that the original subsidy application for 18 to 26 voyages of "Remsen" and "Franklin" was not additional service.

Section 605(c) lays down no tests in clause one for determining what constitutes additional service, other than its reference to the need for "additional vessels" to accomplish the purpose of the Act. For the determination of what services are competitive, however, clause three of § 605(c) requires the consideration of "the type, size and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper." The clause one and two determinations are plainly not dissimilar and clause three constitutes at least a significant guide.

Maritime itself has consistently ruled that "the bona fide character of the operation" is the test of existing service and that the same number of larger and faster vessels with more frequent sailings does not produce such a substantial change

as to amount to an addition to existing service, so long as the previously existing service was "reasonably in accord with the proposed subsidized service." Isbrandtsen Co.--Subsidy, E/B Round the World, 5 F.M.B. 448, 453-454 (1958); States S.S. Co.--Subsidy, Pac. Coast/Far East, 5 F.M.B. 304, 311 (1957); Grace Line--Subsidy Route 25, 4 F.M.B. 549, 553-554 (1954); American President Lines--Subsidy, Route 17, 4 F.M.B.-M.A. 488, 494-495 (1954); Lykes Bros. S.S. Co.--Increased Sailings, Route 22, 4 F.M.B. 153, 158-159 (1953); Pacific Transport Lines--Subsidy, Route 29, 4 F.M.B. 7, 11 (1952); Bloomfield S.S. Co.--Subsidy, Route 15B, 3 U.S.M.C. 299, 304-306 (1946); see, American President Lines--Subsidy, Route 12, 1 M.S.B. 143, 158 (1963).

As in the case of all "grandfather clause" determinations, Maritime's interpretation and application of § 605(c) should be upheld as a matter of the broadest agency discretion since the established test is "bona fide operation" and the "precise delineation of an enterprise which seeks the protection of the 'grandfather clause' has been reserved for the commission." Noble v. United States, 319 U.S. 88, 93 (1943), aff'g 45 F. Supp. 793, 796 (D. Minn. 1942); United States v. Carolina Carriers Corp., 315 U.S. 475, 480 (1942); Alton R.R. Co. v. United States, 315 U.S. 15, 20 (1942); cf. United States v. Maher, 307 U.S. 148, 153-155 (1939). Thus, Maritime had full power to determine that the replacement of two break-bulk vessels by two containerships did not constitute "additional service."

In short, there was no abuse of discretion in Maritime's decision that there was no additional service involved and no reason to hold Export's April 1965 proposal a new application under 46 C.F.R. 201.76 requiring republication under 46 C.F.R. 201.72. Additionally, however, we shall further show that in the circumstances of this case the literal reading of § 605(c) does not require formal notice and trial-type public hearing.

B. Section 605(c) requires formal notice and hearing only if subsidy is for additional service or will be unduly advantageous or prejudicial in competition.

Chapter V of the Merchant Marine Act (46 U.S.C. 1151-1161), authorizing grants of construction-differential subsidy, contains no requirements for hearings. All determinations are to be made on the basis of the applicant's representations and Maritime's staff studies. Chapter VI (46 U.S.C. 1171-1183a), authorizing grants of operating-differential subsidy goes only a short way toward requiring such hearings by making contingent provision for hearings in only three respects.

(1) Section 602 (46 U.S.C. 1172) provides "no contract for an operating differential subsidy shall be made" to meet foreign competition, except "direct foreign flag competition," without a hearing to determine if subsidy is necessary "to meet competition of foreign-flag ships." Section 602 thus requires public hearings if, but only if, Maritime first finds that the subsidy applied for is needed only to meet indirect foreign-flag competition. If Maritime finds on the basis of

its studies that direct competition is involved in the application, no public hearings are required.

(2) Section 605(c) similarly provides in clause one that "no contract shall be made" for service "in addition to the existing service" without a hearing to determine that the existing "service already provided by vessels of United States registry" is inadequate. Clause one thus requires public hearings if, but only if, Maritime first finds that the subsidy applied for is for service in addition to the existing service. If Maritime finds on the basis of its own studies that no addition to the existing service is involved in the application, no public hearings are required.

(3) Section 605(c) again provides in clause two that "no contract shall be made" for subsidy, the effect of which "would be to give undue advantage or be unduly prejudicial" as between the subsidized and other United States operators, without a hearing to determine that such a subsidy contract is necessary "to provide adequate service by vessels of United States registry." Clause two thus requires public hearings if, but only if, Maritime first finds that the effect of the subsidy applied for would be to give undue advantage or be unduly prejudicial between citizen operators. If Maritime finds on the basis of its own studies that the effect of the subsidy contract applied for would not constitute undue advantage or undue prejudice, no public hearings are required.

Literally, § 602 and § 605(c) thus commit to Maritime's sole discretion, on the basis of the application for subsidy and its staff studies, the preliminary determinations of whether (1) the subsidy contract is needed to meet direct foreign-flag competition, (2) the contract will not be for additions to existing service, and (3) its effect will not be undue advantage or undue prejudice between citizen operators. Public hearings are required only when Maritime finds to the contrary, that is, that the contract applied for will involve (1) meeting only indirect competition, (2) is for additions to existing service, or (3) will have an effect which is unduly advantageous or unduly prejudicial.

Sections 602 and 605(c), like the Bank Holding Company Act, 12 U.S.C. 1842, and the Federal Communications Act, 47 U.S.C. 309, require public hearings before the granting of an award only on certain specified contingencies. The F.R.B. may grant applications without hearings; it must order hearings only if an application is opposed by the Comptroller.[8/] The F.C.C. may award licenses without hearings, but applicants have a right to a public hearing before a denial.[9/]

8/ Northwest Bancorporation v. Board of Governors, 303 F.2d 832, 842-844 (8th Cir. 1962); see also, First Wisconsin Bankshares Corp. v. Board of Governors, 325 F.2d 946, 960 (7th Cir. 1963); Kirsch v. Board of Governors, 353 F.2d 353, 356 (6th Cir. 1965).

9/ See Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327, 329-330 (1945); Tamm, Ct. J., dissenting in Folkways Broadcasting Co. v. F.C.C., 126 U.S. App. D.C. 123, 375 F.2d 299, 308-309 (1967).

Wherever possible, applicants for governmental grants should not have imposed upon them the long delays and heavy expenses of public trial-type hearings. See F.C.C. v. WJR, The Goodwill Station, 337 U.S. 265, 275 (1949); F.P.C. v. Texaco, 377 U.S. 33, 44 (1964); Dyestuffs and Chemicals v. Flemming, 271 F.2d 281, 286-287 (8th Cir. 1959). It is true that many agencies, like Maritime in 46 U.S.C. 201.71, provide for "the holding of a hearing not required by statute for any purpose authorized in the statutes it administers." But holding such hearings raises no presumption they are required to establish that they are reviewable. Bridgeport Fed. Sav. & L. Ass'n v. Fed. Home Loan Bank Board, 307 F.2d 580, 582-583 (3d Cir.) cert. den. 371 U.S. 950. The agency does not lose the statutory discretion to proceed without hearings.

In the present case, as with the banking cases, the agency determination is free from review because it is one in the nature of legislative discretion. Clearly, the operating-differential subsidy provisions of both Chapters V and VI impose a legislative program for the administration of federal grant in aid of the nation's merchant marine. Selection of recipients for such governmental bounty is wholly a matter of legislative grace, a grant by the sovereign into whose discretion the courts will not intrude. Heiner v. Diamond Alkali Co., 288 U.S. 502, 507 (1933); Williamsport Wire Rope Co. v. United States, 277 U.S. 551 (1928). Subsidy awards and the manifold determinations which enter into them thus comprise

especially an area of agency discretion. American President Lines v. F.M.B., 112 F. Supp. 346, 358 (D. D.C. 1953). The courts have traditionally refused to review such awards. The decision requires administrative expertise of a highly complex and technical nature; it turns upon issues of national and international political import; and, of course, it constitutes a matter of legislative grace or grant.

The determinations required by § 601, § 602 and § 605(c) call on their face for "insight and aptitude which can hardly be matched by judges who are called upon to intervene at fitful intervals." R.R. Commission v. Rowan & Nichols Oil Co., 311 U.S. 570, 575 (1941). Ultimate resolution of such questions depends upon knowledge, experience and skill with which courts cannot be equipped and without which they wisely refrain from substituting their judgment for that of the agency to which the "formulation and execution of policy have been entrusted" by Congress. R. R. Commission v. Rowan & Nichols, 310 U.S. 573, 581 (1940); United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 485 (1932).

Maritime's preliminary finding that substitution of the two containerships for the two break-bulk vessels did not constitute an addition to existing service and was not unduly advantageous nor unduly prejudicial was plainly reasonable in law and well-founded in the entire record before Maritime on Sea-Land's petition for reconsideration. On the basis of the undisputed dominance of foreign-flag competition on Route

5-7-8-9, with less than 25 percent of the total service being performed by the United States flag vessels, the replacement did not constitute an addition and the impact of subsidizing the two replacement containerships was clearly de minimis.

The over-all situation was thus correctly recognized by Maritime as constituting a mere amendment or supplement to Export's original application and not requiring public hearings to determine adequacy or inadequacy. The inadequacy of the United States flag service, both before and after the subsidy of the two containerships is thus indisputable. Significantly, neither in the petition for reconsideration nor in its briefs in this Court and the court below has Sea-Land ever pointed out anything to the contrary.

With respect to Maritime's further preliminary determination of the absence of prejudice to competitors, it is to be noted that the question is not whether the subsidized operator will be advantaged or competitors prejudiced, but whether there is undue advantage or undue prejudice. This distinction is illustrated by decisions under the similar language of the Interstate Commerce Act, 49 U.S.C. et seq. See esp., Board of Trade v. United States, 314 U.S. 534, 546 (1942); Nashville, O. & St. L. Ry. v. Tennessee, 262 U.S. 318, 322 (1923); Manufacturers Ry. Co. v. United States, 246 U.S. 457 (1918). In the latter case the Court explained (at p. 481)--

> Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have

> been confided by Congress to the judgment and discretion of the Commission (Interstate Commerce Commission v. Alabama Midland R. Co., 168 U.S. 144, 170), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or, for some other reason, amount to an abuse of power. * * *

See also, Noble v. United States, 45 F. Supp. 793, 799 (D. Minn. 1942), aff'd 319 U.S. 88 (1943). Here again, as with the question of additional service, Maritime properly exercised its discretion so long as it exercised a rational judgment.

In sum, we submit, it is clear that defendants' decision under § 605(c) not to hold public hearings to determine the inadequacy of existing United States flag service was clearly in accordance with law both in June 1966, when the contract was executed, as well as in August 1965, when the award was made. In any event, however, as we have seen above, Sea-Land has no cause of action nor standing to complain of the agency decision against holding a public hearing.

CONCLUSION

For the foregoing reasons, the decision of the court below was in all respects correct on the merits. Additionally, the record shows that Sea-Land had no cause of action and no standing to sue. The judgment dismissing the complaint should therefore be affirmed.

Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General,

DAVID G. BRESS,
United States Attorney,

JOHN C. ELDRIDGE,
LEAVENWORTH COLBY,
Attorneys,
U. S. Department of Justice,
Washington, D. C. 20530.

November 1968

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing brief upon John Mason, Esq., Ragan and Mason, 900 17th Street, N.W., Washington, D.C. 20006, counsel for appellant, and upon James Jacobi, Esq., Kurrus & Jacobi, 2000 K Street, N.W., Washington, D.C. 20006, counsel for intervenor-appellee, by mailing copies so addressed to them, first-class mail, postage prepaid.

Dated:

LEAVENWORTH COLBY

REPLY BRIEF FOR APPELLANT
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 22140

SEA-LAND SERVICE, INC.

APPELLANT

v.

JOHN T. CONNOR, et al.

APPELLEES

APPEAL FROM FINAL ORDER BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

John Mason
Edward M. Shea

Attorneys for Appellant

RAGAN & MASON
900 - 17th Street, N. W.
Washington, D. C. 20006
296-4750

I. Proceedings Since the Filing of Appellant's Brief

Appellant filed its brief on August 20, 1968. Thereafter appellees sought, with appellant's consent and were granted an extension to October 28 to file their briefs. Thereafter, on October 18, appellees sought an additional thirty days' extension which was opposed by appellant.

On November 18, Chief Judge Bazelon ordered, inter alia, that appellees time for filing their brief be extended to and including November 21, and that the Clerk reschedule this case for oral argument on a day as soon after the filing of this reply brief as the business of the court permits.

While appellee American Export Isbrandtsen Line, Inc. (AEIL) duly filed its brief on November 21, appellees John T. Connor, et al. ("the Government appellees") have filed no brief in this case.

Accordingly, this reply brief is directed to the brief of AEIL.

II. AEIL's Assertions Contrary to, or Outside of the Record

Apparently uncomfortable with the case at bar, AEIL has devoted most of its brief to a dissertation on the responsibilities that a subsidized carrier assumes in consideration of federal subvention. While generally objectionable

as being dehors the record and issues, this dissertation is specifically objectionable in that interwoven therein are inferences which are at best misleading as indicated in B below. Even more objectionable, however, is that when AEIL does come to grips with relevant material, AEIL's arguments are grounded on matters of fact contrary to or absent from the record as noted in A below.

A. Assertions Contrary to-or Not of-Record

1. AEIL says, at page 6 of its brief:

> "The fact is clear that the Board never denied AEIL's application for operating-differential subsidy on Trade Route 5-7-8-9, but it did refuse to grant operating-differential subsidy on the SIR JOHN FRANKLIN and REMSEN HEIGHTS on an interim basis, before the converted containerships started service. . . ."

Not only is this statement at odds with AEIL's whole theory of the case that specific vessels are not the subject of operating subsidy contracts (see page 5 of AEIL's brief), but it is also contrary to the facts of record. JA42 clearly shows that it was the application of February 24, 1964, which was denied. This is, of course, the application which AEIL alleges was "amended."

2. AEIL's entire [1] theory of the case goes something like this. AEIL had the right to operate eighteen sailings on an unsubsidized basis on the relevant Trade Route (JA38). In 1964, it applied for operating subsidy for a minimum of 15 and maximum of 26 sailings based on that existing non-subsidized operation (JA39) which was duly noticed for hearing. From this point, AEIL argues that its 1965 application was amendatory of the 1964 application; the notice of hearing for the former obviating the need for notice of hearing of the latter. [2]

Underlying this theory is the presumption that AEIL's original right to operate eighteen sailings on an unsubsidized basis was extinguished concurrent with the approval of the "application as amended." Not only is this presumption not a fact of record, but as late as August 5 of this year AEIL's president asserted in an application filed with the MA/MSB that AEIL still:

1/ AEIL's brief is silent with respect to Issues I, III and IV, as to which AEIL was equally silent when Sea-Land proposed the statement of issues in the case.

2/ This explanation does not, of course, come to grips with the different number of sailings, ports, company involved, etc., (see comparison at page 9 of Appellant's brief) or the fact that the 1964 application was denied.

> "has authority. . .to operate up to
> 18 unsubsidized voyages annually
> on Trade Route 5-7-8-9."

We ask the Court to take judicial notice of the assertions in this public document; the relevant pages of which are attached to the affidavit of Edward M. Shea which is appended to this brief. Since AEIL has asserted long after entry into the subsidy contract at issue, pursuant to the 1965 application, that it still retains the unsubsidized sailing rights which were the res of the 1964 application, it follows that the 1965 application must have stood on its own. Since no notice or hearing was given with respect to it, it must be set aside.

Before noting the more offensive (due to their misleading inferences) irrelevancies contained in AEIL's brief, a word should be said about AEIL's arguing matters not of record at this late date.

In August of 1967, Sea-Land filed a request for admission of facts pursuant to Rule 36 of the Federal Rules of Civil Procedure, including facts which AEIL is not contesting.[3/] For its own reasons, AEIL did not contest those

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3/ E.g., that the application of February 24, 1964, was denied.

facts as that right is accorded under Rule 36.

Upon filing its Motion for Summary Judgement, Sea-Land filed its Statement of Material Facts under local rule 9 (h). Again, for its own reasons, AEIL neither filed a counterstatement of facts nor challenged Sea-Lands'.

When the statement of the issues and designation of appendix were proposed by Sea-Land in this Court, AEIL again saw fit not to avail itself of the opportunity to participate in the formulation thereof.

In this context, we find it particularly inappropriate for AEIL to attempt to remould the facts as just discussed, and to confuse the issues with irrelevancies as next noted.

B. Irrelevant Argument

As above noted, AEIL devotes the great bulk of its brief on a dissertation on the Merchant Marine Act of 1936 and the various obligations that a subsidized line must undertake in consideration of federal subvention (p.p. 7-17). This dissertation, though irrelevant, would not be particularly objectionable but for several misleading and/or untrue inferences therein.

1. On page 12 of its brief, AEIL states:

> "(8) A subsidized operator must construct, reconstruct and repair its vessels in United States shipyards - Sea-Land does not."

There is absolutely nothing in the record - nor could there be - that would indicate that Sea-Land operates foreign-built vessels in the domestic or foreign commerce of the United States. This inference is not only unsupported and untrue, but is also inconsistent with AEIL's observation on the same page - at (3) - that Sea-Land can operate in the domestic trades. Anyone with the slightest knowledge of the maritime laws of the United States knows that the cabotage laws (46 USC §883) bar the carriage of cargo in the domestic trades with any vessel not constructed in the United States.

2. Beginning on page 13 of its brief, AEIL makes much of the fact that carriers have replaced vessels during the course of subsidy contracts without a new Section 605(c) hearing having been held. Although this is true; (1) this is simply not the case here, and (2) this practice - where very substantial additional capacity results - has

never been the subject of either judicial review or - so far as we know - a decision by the MA/MSB itself.

This argument is explored through page 17 where AEIL notes that both United States Lines, Inc. and Moore-McCormack Lines, Inc. are currently replacing existing vessels with containerships. First, what AEIL does not note is that, unlike the facts here, the amount of subsidized sailings is to remain the same; Second, and even more importantly, Moore-McCormack will retire six break bulk vessels from the trade when it puts in its four container vessels, while United States Lines, Inc. is obligated to retire from 9 to 11 of its break bulk vessels in the course of introducing its five or six containerships. Thus, unlike the AEIL two for two ratio, in those cases there is substantial provision with regard to the impact of additional capacity.

III Conclusion

For the reasons heretofore stated, and particularly in light of the Government appellees' failure to respond at all and AEIL's failure to argue three of the four issues, Sea-Land asks this Court to reverse and remand the case to

the District Court with the directions requested in Appellant's brief.

Respectfully submitted,

John Mason

Edward M. Shea

Edward M. Shea

Attorneys for Appellant
Sea-Land Service, Inc.

RAGAN & MASON
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Washington, D. C. 20006
296-4750

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing Reply Brief of Appellant to be served on the United States Attorney for the District of Columbia; Levenworth Colby, Esquire, Department of Justice (attorney for the Government Appellees); and Richard Kurrus, Esquire (attorney for Appellee AEIL) by first class mail, postage prepaid.

Dated at Washington, D. C. this 5th day of December 1968.

John Mason

AFFIDAVIT

My name is Edward M. Shea, and I am one of the attorneys for Sea-Land Service, Inc. (Sea-Land) in Sea-land v. Connor, No. 22140. I know that the following statements are true.

On or about August 5, 1968, Appellee American Export Isbrandtsen Lines, Inc. (AEIL) filed an application with Appellee Maritime Subsidy Board/Maritime Administration (MA/MSB) for operating differential subsidy on Essential Trade Route No. 29. In the normal course of my representation of Sea-Land, I obtained a copy of said application from said MA/MSB later in the month of August. The attached four pages are true copies of the cover sheet and pages 8, 38 and 39 of said application.

Having become aware of the representations contained on page 8 of said application after having filed appellants' brief in this proceeding, I contacted counsel for the Government appellees early in September, both by telephone and by letter with said page 8 attached to make him aware of those representations. No responses to those communications have been made to me by counsel for the Government appellees.

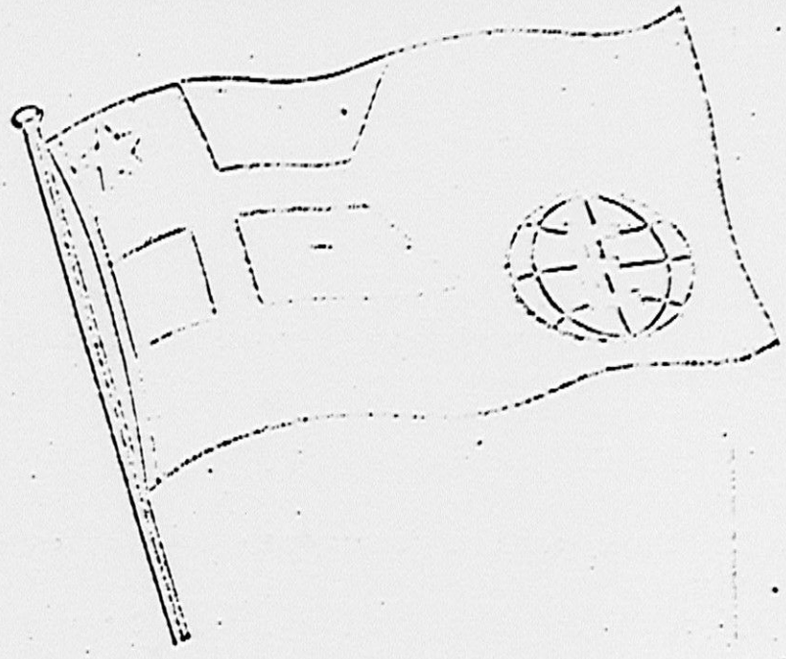
Edward M. Shea

Edward M. Shea

Subscribed and sworn before me this 29th day of November 1968, in Washington, District of Columbia.

Mary L. Edwards

Notary Public



APPLICATION

FOR OPERATING-DIFFERENTIAL SUBSIDY
ON ESSENTIAL TRADE ROUTE NO. 29
UNDER TITLE VI, MERCHANT MARINE ACT, 1936

August 5, 1958

AMERICAN EXPORT
ISBRANDTSEN LINES
INC.

26 BROADWAY · NEW YORK · N.Y. · 10004

B. AS TO THE APPLICANT: ITS BUSINESS ACTIVITIES AND RELATIONSHIPS

10. A BRIEF DESCRIPTION OF (a) THE SHIPPING BUSINESS OF THE APPLICANT AND (b) ANY OTHER BUSINESS ACTIVITIES OF THE APPLICANT DURING THE PRECEDING FIVE YEARS. IF, WITHIN SUCH PERIOD, THE APPLICANT HAS ACQUIRED THE BUSINESS OF ANOTHER PERSON OR HAS BEEN REORGANIZED, THERE SHOULD BE INCLUDED A BRIEF DESCRIPTION OF SUCH ACQUISITION OR REORGANIZATION.

(a) Applicant has operated subsidized service on Essential Trade Routes 5-7-8-9, 10, 12, 18, 32, and 34, and Round-World (East-bound.) In addition, the Applicant has authority under Article II-16 of its Operating-Differential Subsidy Agreement Contract No. FMB-87 to operate up to 18 unsubsidized voyages annually on Trade Route 5-7-8-9. Full details of the Applicant's activities in these services appear in reports regularly submitted to the Maritime Administration.

(b) The operation of passenger and cargo vessels as described in the answers to Section (a) of this question is the only business in which the Applicant has been engaged during the preceding five years.

11. A BRIEF DESCRIPTION OF THE GENERAL CHARACTER AND LOCATION OF THE PRINCIPAL PROPERTY OF THE APPLICANT, OTHER THAN VESSELS, EMPLOYED IN ITS BUSINESS.

The Applicant's principal property, other than vessels, consists, generally, of container and chassis equipment, related vessel equipment, and terminal and office properties located at the Applicant's terminals and offices.

12. FULL DETAILS CONCERNING THE SERVICES, ROUTES, OR LINES ON WHICH VESSELS OWNED OR CHARTERED BY THE APPLICANT ARE NOW OPERATED, INCLUDING PORTS OF CALL, TERMINAL AND DOCK FACILITIES AT ALL SUCH PORTS, FREQUENCY OF SAILINGS PER YEAR DURING RECENT YEARS, DESCRIPTION OF SERVICES AND VOYAGES, AND NAMES OF VESSELS SEGREGATED ACCORDING TO SERVICES, ROUTES, OR LINES.

The Maritime Administration is fully aware of the Applicant's activities on the services, routes, and lines on which its subsidized vessels operate, from reports regularly submitted to the Maritime Administration, pursuant to General Orders Nos. 12 and 27

EXHIBIT V - et seq. - SUCH OF THE FINANCIAL STATEMENTS, COPIES OF CONTRACTS, SCHEDULES, AND OTHER DATA REQUIRED HEREUNDER WHICH APPLICANT DESIRES TO ATTACH AS EXHIBITS INSTEAD OF INCORPORATING IN THE BODY OF THE APPLICATION.

Information currently on file with the Maritime Administration.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

MANUEL DIAZ
President

ATTEST:

MICHAEL J. ESPOSITO
Assistant Secretary

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

I, MANUEL DIAZ, being duly sworn, depose and say that I am the President of American Export Isbrandtsen Lines, Inc., the Applicant on whose behalf I have executed the foregoing Application pursuant to authority duly vested in me by the Board of Directors of the Applicant, which has duly authorized the filing of this Application; that the Applicant is a citizen of the United States within the meaning of the Shipping Act, 1916, as Amended (U.S.C., Title 46, Sec. 802); that this Application is made for the purpose of inducing the Maritime Administration, U. S. Department of Commerce, to grant an operating differential subsidy to the Applicant, pursuant to the provisions of The Merchant Marine Act, 1936, and particularly Title VI thereof; that I have carefully examined the Application and all documents submitted in connection therewith, and, to the best of my knowledge, information and belief, the statements and representations contained in said Application and related documents are full, complete, accurate, and true.

MANUEL DIAZ
President

Subscribed and sworn to before me,
a Notary Public in and for the
State and County above named, this
6th day of August 1968.

DONALD L. CALDERA

DONALD L. CALDERA
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-0531715
Qualified in Westchester County

SECOND
REPLY BRIEF FOR APPELLANT
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

NO. 22140

SEA-LAND SERVICE, INC.

APPELLANT

v.

JOHN T. CONNOR, et al.

APPELLEES

APPEAL FROM FINAL ORDER BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

John Mason
Edward M. Shea

Attorneys for Appellant

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296-4750

TABLE OF AUTHORITIES

I. Introduction

By Order of the Court of December 18, 1968, appellant was granted permission to file, within ten days, a reply brief to the late lodged brief of appellees John T. Connor, et al, ("the Government appellees") which was directed to be filed by that same order. This Second Reply Brief is that document, and is directed solely to the points raised in the Government appellees' brief.

II. Standing

The Government argues that appellant had no standing to bring the action here on appeal because:

A. Appellant obtained the hearing it requested; and,

B. Appellant was not a person entitled to a hearing under Section 605(c).

These issues are next discussed.

A. Did appellant obtain the "hearing" it requested?

1. Hearing

On this point, the Government (pp. 16-20) calls the Court's attention to several cases holding either that no error had resulted from administrative denial of a hearing; or that the hearing that was granted was sufficient.

The Government appellees also there cite 1 Davis, Administrative Law §7:01 (1958). While we thing that--for reasons stated below--the case citations miss the point, we think the treatise citation is quite significant.

The first, terse sentence of §7.01 of Davis reads:

> "A 'hearing' is any oral proceeding before a tribunal." (emphasis added)

Appellant never was given the opportunity to make an oral presentation at any stage of the administrative process (i.e., neither before a Hearing Examiner, nor before the MA/MSB, nor the Secretary of Commerce, nor any representative of any of the aforesaid). That, we submit, is what this case is all about.

As noted above, we think that the several cases cited to the Court in this section of the Government appellee's brief have no precedential value. As the Government appellees' note later in their own brief (p. 32), the statute under which the Federal Communications Commission functions has no hearing requirement with respect to the a-

warding of licenses.[1] Accordingly, the cases cited are unlike the situation here. Likewise, the Civil Aeronautics Board[2] and Interstate Commerce Commission[3] cases involved a section of the underlying statute which has no hearing requirements.

All of the other cases cited which reviewed administrative hearings stand for the proposition that the hearing granted was sufficient. In each case, however, there had been an opportunity to be heard in the aural sense (either before an examiner with respect to factual issues or before the agency with respect to legal issues) sometime in the course of the administrative process.

2. Hearing Requested

The Government appellees (at pp. 6 and 17) seem to fault appellant for not requesting a "rehearing" in its petition to reopen for reconsideration (RA Att. 29). They

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1/ TI Broadcasting, Inc. v. F.C.C., 126 U.S.App.D.C. 54, 374F.2d 268 (1966); F.C.C. v. WJR, the Goodwill Station, 337 U.S. 265; American Broadcasting Co. v. F.C.C., 85 U.S.App.D.C. 343, 179 F.2d 437 (1949).

2/ Fugazy Travel Bureau V.C.A.B., 121 U.S.App.D.C. 335, 350 F.2d 733 (1965).

3/ Lincoln Transit Co. v. United States, 256 F.Supp. 990, (S.D.N.Y. 1966).

do not explain, however, how something can be "reheard" when it wasn't heard in the first place.

What appellant did ask for was reopening and reconsideration. The first action by the MSB sought to be reconsidered was:--

> "As grounds for reconsideration we assign:--
> First, that Finding C.1 of the Maritime Subsidy Board, appearing in Document No. 3 itemized above, is erroneously decided. That finding is as follows:
> 'That the proposed substitution of the converted SSs TRANSINDIA and TRANSORIENT for the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN, does not require either republication in the Federal Register of the application of American Export Isbrandtsen Lines, Inc., for operating-differential subsidy on Trade Route 5-7-8-9 or hearings under Section 605(c) of the Act..'
> Section 605(c) provides under certain specified circumstances for a 'proper hearing of all parties', and under other circumstances, for whatever the difference may be, a 'public hearing' in connection with the standards fixed by that section. The Administrative Procedures Act, Sec. 5(a), in such case, requires notice of such hearing."
> (RA Att. 29, pp 8,9)

Since the MA/MSB has never noticed and heard the application, we cannot understand how the Government appellees can seriously urge the Court to hold that appellant received the "hearing" it asked for.

True, appellant included some substantive arguments, and attached an affidavit, in urging the MSB to reconsider and reopen the matter. However, we cannot conceive how such matters put together within ten days after publication of a press release and based on an incomplete copy of the underlying application (RA Att. 29, p. 3) somehow waived appellant's statutory right to be heard. Parenthetically, the Government appellees later in their brief, p. 35, chide appellant for <u>not</u> having made arguments or presented evidence on the substantive issues:

> "The inadequacy of the United States flag service, both before and after the subsidy of the two containerships is thus indisputable. Significantly, neither in the petition for reconsideration nor in its briefs in this Court and the court below has Sea-Land ever pointed out anything to the contrary."

Finally, while the MA/MSB in its Opinion (JA 5-17) swept aside appellant's substantive arguments and expressed a lack of credence in the affidavit:

> "...this affidavit, which was executed on August 31, 1965, cannot, of course, be considered prior notice to the Board, or even a promise that

> adequate service will be inaugurated and maintained." (JA 14)
>
> - - -
>
> "...There have been situations in the past where subsidy has been denied to certain operators because other U. S.-flag operators have indicated intentions of entering and having actually entered service on a nonsubsidized basis, only to have such intervenors subsequently apply for subsidy themselves, once the original applicant was out of the way." (JA 13)

The MA/MSB obviously realized that what they were doing was,among other things, denying a hearing under Section 605(c).

> "...Having reviewed the petition, we find that is presents nothing of consequence and nothing that would in any manner establish improper or illegal action by the Board under all pertinent provisions or the 1936 Act." (JA 9)

In sum, we submit that--much less the "hearing" it requested--appellant never received any hearing. All it received was a summary denial of its petition for reopening and reconsideration of the MA/MSB's findings, inter alia, that a hearing was unnecessary. Accordingly, appellant can hardly be said to have no standing on the basis that it received what it asked for.

B. Was appellant a person entitled to a hearing?

As we read the Government appellees' brief on this point (pp. 21-27), its position is that appellant is without judicial standing because it had no right to ask MA/MSB to reconsider its failure to notice and to hear AEIL's application for the reason that appellant was not "a line serving the route" in competition with AEIL's "existing non-subsidized operation." It seems significant to us that the argument is not made in terms of appellant's failing to meet the judicial standard of one adversely affected by agency action within the meaning of any relevant statute.

We pretty much stand on our position with respect to standing set out at pp. 37-45 of our brief. However, three specific rebuttal points must be noted.

1. At p.21 of their brief, the Government appellees point out that Waterman, appellant's then affiliate, "had withdrawn its intervention." This intervention and withdrawal, however, had been directed to AEIL's first application for subsidy of the break bulk vessels SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN. Accordingly, appellant does not rely on Waterman's actions, but does point to Waterman's status as a "line serving the route" during the relevant time period as one of several reasons why appellant was a person entitled to notice and hearing.

2. At pp. 22-23, the Government appellees discuss standing in the context of the statutory language of Section 605(c). However, if they remained true to the construction of the Section that they later urge upon the Court, they would not have to so argue. That is, at pp. 30-36, it is argued that notice and hearing never had to be given since the MA/MSB had the discretion to make preliminary ex parte findings as to "inadequacy" and "undue advantage." We address that argument later.

Here, however, it is necessary to again point out that Section 605(c) - if it gives the right to be heard at all - gives that right to "all parties" where the service is "in addition to the existing service," and to "a public hearing, due notice of which shall be given to each line serving the route," where the application relates "to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States." For reasons stated in our brief, we assert that appellant met both of these tests (although meeting either would be sufficient); and that, in any event, appellant is a person adversely affected by the failure of the MA/MSB meet its duty under the relevant statute.

3. By what the Government characterizes as "The short answer"(p. 23), but what we would call a conclusory statement, it is contended that "proper hearing of all parties" under Section 605(c) "derives from similar provisions" of other transportation laws conferring standing on "all parties in interest." Not only are the phrases substantially dissimilar on their respective faces, but no attempt is made to link up the phrases by reference to legislative history.

One significant difference between the Merchant Marine Act of 1936 and other regulatory laws is that the former regulates only a portion of the industry (and even then only because those regulated voluntarily contract to be regulated in consideration of the payment of subsidy), while the latter statutes regulate substantially all of the industry, usually requiring certification as a condition precedent to operation. It was in this context that Congress not only gave standing to those who had no subsidy applications pending, but also gave protection from subsidized competition to unsubsidized operators, as such, upon certain findings.

Accordingly, it is beneath the Government appellees to tell this Court, at p. 26, that:

> "Section 605(c) and its hearing provisions show on their face that their purpose was to permit applicants to show they are eligible for awards of subsidy, although Maritime has found that the application would involve additional service or that subsidy would give the applicant undue advantage to the prejudice of existing competitors." (emphasis in original)

Section 601(a) of the Act is where the criteria which parallel the "fit, willing and able" provisions of other regulatory laws. 4/

Section 605(c) is for the purpose of developing in open hearings evidence with respect to (1) adequacy of existing service, (2) whether additional service will be in the accomplishment of the purposes and policy of the Act, and (3) --under certain circumstances--whether the effect of the subsidy contract would be to give undue advantage or to be unduly prejudicial.

In American Pres. Lines, Ltd.--Atlantic/Straits Service, 1 MA 143 (1963), where the statute, legislative history, and prior decisions were exhausively reviewed, the

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4/"...No such application shall be approved...unless...(1) the operation...is required to meet foreign-flag competition...(2) the applicant [will have appropriate] vessels...(3) the applicant possesses the ability, experience, financial resources, and other qualifications necessary...to meet competitive conditions ...."

MA/MSB said:

> "Section 605(c) of the Act is one of the instances where Congress felt a proper hearing would be appropriate. It appears that Congress felt that in determining the issues of adequacy and inadequacy of existing services provided by citizens, a hearing would be beneficial to the Board in making its determinations, and would also serve the purpose of giving interested parties an opportunity to submit for the record matters they would want the Board to consider in arriving at a decision."(at 152)
>
> - - -
>
> "...We are under a statutory obligation to allow every interested U. S. citizen an opportunity to state his position regarding the need for the proposed service. ..." (at 153)
>
> - - -
>
> "The intervenors contend that under the 'purposes and policy' clause of the first part of the first sentence of section 605(c) the Board must consider the impact the proposed additional service would have upon the existing services of the intervenors.

> We agree that the intervenors should be permitted to show and develop what they consider to be the probable impact on them of the additional service. It is a matter particularly within the knowledge of the intervenor and is information not easily obtained by the Agency. While such arguments are speculative in their nature and not subject to exact standards of proof, we believe they should be admitted and evaluated in the light of what is adequate service by U. S. vessels and what would accomplish adequate service." (at 161).

III. The Merits

The Government appellees argue (A) at pp. 27-30 that a hearing was not required because AEIL's proposal of April, 1965 was an amendment or supplement to the February, 1964 application. Next, (B) at pp. 30-36, a construction of the statute is urged which would make the hearing provided for under Section 605(c) not a right at all; but a contingency depending on preliminary, ex parte findings by the MSB.

A. AEIL's April, 1965 filing; Application or Amendment?

While the Government appellees strongly urge that AEIL's "proposal" of April, 1965, was an amendment or supplement to the February, 1964 application, we believe that a

fair reading of: (1) The April, 1965, filing itself; (2) the contemporaneous statement of AEIL, (3) the admission of fact by all appellees in the court below; (4) the disposition of the February, 1964 application; and (5) the MA/MSB decision here under review clearly show that AEIL's April, 1965 filing was an application for additional service.

(1) The April, 1965 Filing Itself

> "AEIL has an application for operating-differential subsidy pending before the Board for the subsidization of the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN of Trade Routes 5-7-8-9 for 26 sailings annually. It has been found by the Board that section 605(c) is not a bar to this application and, so far as we know, it has met all of the requirements of the Act and of the Board's regulations thereunder. The application is now pending the final approval of the Board.
>
> The proposal which we are setting forth contemplates that the Board will act favorably on AEIL's pending application for subsidy on Trade Routes 5-7-8-9...."(RA Att. 12, p. 15) (emphasis added)

(2) Contemporaneous Statement by AEIL

RA Att. 11, which is AEIL's letter of transmittal of the proposal of April, 1965, signed by the then President of AEIL, defines the subject thereof as:

> "Application and Proposal to Establish CONTAINER MARINE LINE, etc."

Nowhere in that letter is the February, 1964 application mentioned.

(3) The Admission of Fact

> "13. At a meeting of March 30, 1965, the Board of Directors of American Export Isbrandtsen Lines, Inc., authorized the filing of an application for,among other things: operating differential subsidy on two vessels to be acquired and converted to containerships for operation on Trade Route 5-7-8-9,..." (JA 42, 43)

(4) February, 1964 Application Disposition

> "Following the above actions you are advised that the Board denied your application of February 24, 1964, regarding the SSs REMSEN HEIGHTS and SIR JOHN FRANKLIN since there would be no real purpose in temporarily subsidizing these two old vessels during the few months prior to the entry of the containerships into the North Atlantic Service." (RA Att. 10)

(5) The MA/MSB Decision

> "The facts are that on April 7, 1965, American Export Isbrandtsen Lines, Inc., filed an application for operating and construction differential subsidy as...replacements for two cargo vessels... currently operating without subsidy..." (emphasis added) 5/

At pp. 5 and 27, the Government appellees tell the Court in a conclusory manner that the April, 1965 proposal couldn't have been an application because it did not meet the requirements of 46 C.F.R. §201.76. However, the Government does not tell the Court in that respect it failed to meet those standards. We cannot know, for appellant never was able to obtain a full copy of the April, 1965 filing, which AEIL asked to be treated confidentially. (JA 46). Accordingly, the only portions of the April, 1965 filing which are of record here are those parts (RA Att's 12 through 15) supplied to appellant.

It is then stated by the Government appellees that:

> "..the April proposal could only be an amendment or supplement under 46 C.F.R. 201.77..." (p. 27)

5/While this statement is at odds with what AEIL actually asked for, and while there is no evidence that AEIL's unsubsidized rights were subsequently revoked, the MA/MSB clearly did not consider AEIL's April, 1965 application as amendatory to AEIL's February, 1964 application.

However, 46 C.F.R. 201.77 (which speaks in terms of pleadings) provides that:

> "...amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading."

Since the application of February, 1964 was noticed in the Federal Register,[6/] it would seem to follow that the "amendment or supplement" thereto would also have to be so noticed.

With respect to the Government appellees' position that not only was the April,1965, filing an amendment, but also an amendment to an application grounded on existing service, we call the Court's attention to the applicant's Reply Brief of December 5 with attached affidavit. There, we have shown that AEIL's existing, unsubsidized rights which are alleged to underlie the April, 1965 application were considered to be still in existence by AEIL as late as August, 1968.

While we in the main rest on the reasons given in our brief why the April, 1965 filing--whether an app-

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6/ It is worth mentioning in passing that MA/MSB's noticing of the February, 1964 application was highly inconsistent with its position that such notice is unnecessary where based on an existing service.

lication or amendment--had to be noticed and heard, we would make one more observation before moving on to the next point.

At. p. 29 of their brief, the Government appellees cite several MA/MSB decisions concerning the standards for determining whether a service is an existing one. We must point out that, in every case so cited, the MA/MSB made its determination on this issue <u>after a hearing</u> pursuant to Section 605(c) where the applicants and intervenors in opposition were accorded the opportunity to introduce evidence and to cross-examine on precisely this factual issue. As counsel for appellee AEIL pointed out in argument on the motion for summary judgment in the court below:

> "Mr. Kurrus: The administrative decisions of the Maritime Subsidy Board and its predecessor agencies are consistent that a hearing has to be held to determine whether or not a service is existing.
>
> I think Mr. Colby's construction of the statute is an allowable interpretation, but, unfortunately, the administrative decisions are unamously to the contrary. (JA 102)

B. Hearing--A Right or a Matter of Administrative Discretion?

The Government appellees, pp. 30-36, in effect are telling the Court that for the last 32 years the agency and its predecessors have misconstrued the meaning of Section 605(c); all that time thinking they had a duty to hold hearings while no such duty existed.

This is not a situation like that in Bridgeport Fed. Sav. & L. Ass'n v. Federal Home Loan Bank Bd. 307 F.2d 580, (3d Cir. 1962), cited by the Government appellees, where the agency involved has held hearings from time to time, but articulating that the hearings were to be limited in nature and for the agency's own convenience and information. On the contrary, the MA/MSB has consistently held that it has the statutory duty to hold hearings to determine matters of fact relevant to Section 605(c) issues. See, e.g., American Pres. Lines, Ltd.--Atlantic Straits Service, 1 MA 143 (1963), quoted at length at pp. 11,12 herein.

At p. 18 of Brief for appellant, we said:

> "Rather than bloat this brief with further citations, however, we challenge the Appellees to cite to this Court any instances where the MA/MSB has articulated the position that it had the power to reserve to itself for administrative determination the issues of whether a service was "existing" or "additional," and whether a subsidy grant would result in preference or prejudice."

The Government appellees have not risen to this challenge, because they could not: For the novel interpretation of Section 605(c) which has been presented to the court below and to this Court has never been administratively asserted.

We suppose that it is conceivable that a statute might be misconstrued over a third of a century by the agency charged with administering it. However, we suggest that it would be totally out of step with the evolution of administrative law, as well as lay Section 605(c) open to attack on constitutional grounds, to read the right to be heard out of this rather obscure statutory provision.

Just two more points.

Appellant has resisted the temptation to argue the merits of the case (i.e., what it would have tried to prove in the Section 605(c) hearing it believes it had the right to) in the belief that chances of prevailing are irrelevant to the issue of whether notice and hearing were required. However, we believe that the unsupported statement of the Government appellees, at p. 35:

> "The inadequacy of the United States flag service, both before and after the subsidy of the two containerships is thus indisputable. Significantly, neither in the petition for reconsideration nor in its briefs in this Court and the court below has Sea-Land ever pointed out anything to the contrary."

warrants response. Accordingly, we cite to the Court the decision of an MA/MSB hearing examiner, Moore-McCormack and AEIL--Sec. 605(c) Applications, 10 SRR 282 (1968) where it was found, concluded and recommended that Section 605(c) was a bar to the subsidizing of additional containership sailings by AEIL on this same trade route on the basis, inter alia, of a failure to demonstrate an inadequacy of U. S. flag service.

Finally, speaking of temptation, we cannot resist re-citing to the Court the last case quoted from in the Government's brief (pp. 35,36);

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (Interstate Commerce Commission v. Alabama Midland R. Co., 168U.S.144, 170), and upon which its decisions,made the

> basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits or, for some other reason, amount to an abuse of power...."7/ (emphasis added)

Since "those questions of fact" were indeed decided "without a hearing," we again ask this Court to cause AEIL's April, 1965 application to be heard, as required by law, at long last.

7/ Manufacturers Ry. Co. v. United States. 246 U.S. 457 (1918).

Respectfully submitted,

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